DOCUMENT RESUME

ED 222 593 UD 022 548

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TITLE In Defense of the Alien. Volume II. Immigration Law and Legal Representation. Proceedings of the Annual Legal Conference on Alien's Rights: Options for the 1980s (Washington, D.C., March 29-30, 1979). First Edition.

INSTITUTION Center for Migration Studies, Inc., Staten Island, N.Y.

REPORT NO ISBN-0-913256-53-6

PUB DATE 80

NOTE 176p.; Not available in paper copy due to institution's restrictions. For related documents, see UD 022 547-550.

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.

DESCRIPTORS *Civil Liberties; *Court Litigation; *Federal Legislation; Federal Programs; Foreign Countries; Foreign Policy; *Illegal Immigrants; Immigrants; International Relations; *Legal Aid; Mexicans; Migrant Employment; *Public Policy; Social Services

IDENTIFIERS Arab States; Deportation; Immigration and Naturalization Service; Mexico; *Select Commission Immigration Refugee Policy; Social Security

ABSTRACT

This collection of papers from a 1979 legal symposium presents the views of government representatives and experts from the private sector concerning the rights of legal and illegal aliens in the United States, international trends in aliens' rights, and immigration/refugee policy options and issues for the 1980s. Issues considered include: (1) continuing Immigration and Naturalization Service efforts to improve treatment of undocumented aliens in the United States; (2) basic rights of aliens; (3) employment rights under immigration law; (4) rights to due process in deportation and exclusion proceedings; (5) legal problems that may arise in consulates abroad; (6) problems of undocumented Mexican workers in the United States and efforts to resolve these problems; (7) alien eligibility for government benefits; (8) discretionary relief from deportation; (9) guidelines for lawyers seeking appeals and judicial review of deportation orders; (10) international and U.S. immigration and refugee policies; (11) government and private perspectives on immigration policy issues; (12) rights to asylum in the United States; and (13) trends in migrants' rights in the Arab countries. Contributors include Leonel J. Castillo, Austin T. Fragomen, Jr., Sam Bernsen, Peter Schey, Stephen Fischel, Hugo B. Margain, Herman L. Bookford, Jack Wasserman, Donald F. Heisel, Elizabeth J. Harper, Charles Gordon, Charles B. Keely, Doris M. Meissner, and Georges Dib. (Author/MJL)

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IN DEFENSE OF THE ALIEN

Volume 2

Immigration Law and Legal Representation

Proceedings of the 1979 Annual Legal Conference
on Alien's Rights: Options for the 1980s
March 29 and 30, 1979
Washington, D.C.

EDITED BY

AUSTIN T. FRAGOMEN, JR. AND LYDIO F. TOMASI

UD 022 548

1980
Center for Migration Studies
New York

The Center for Migration Studies (CMS) is an educational, non-profit institute founded in New York in 1964 to encourage and facilitate the study of sociological, demographic, historical, legislative and pastoral aspects of human migration and ethnic group relations. CMS organizes an annual legal conference on immigration, the proceedings of which are published regularly in a volume series entitled **In Defense of the Alien**. *This text represents the second volume of that series.*

IN DEFENSE OF THE ALIEN
VOLUME II
Alien's Rights: Options for the 1980s
First Edition

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Center for Migration Studies
209 Flagg Place
Staten Island, New York 10304

ISBN 0-913256-53-6
Library of Congress Catalog Card Number 80-65474
Printed in the United States of America

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Introduction

THIS volume contains the proceedings of the second symposium on U.S. immigration law and policy sponsored annually by the Center for Migration Studies. The first volume in this series dealt with the legal aspects of the apprehension, detention, and expulsion of undocumented workers from the United States.

This second volume continues to focus on various aspects of the rights of aliens both legally and unlawfully present in the United States as well as on international trends in alien's rights. It also looks ahead to available policy options, toward a comprehensive legislative framework for an area of jurisprudence which is changing and complex in its domestic and foreign policy implications.

Since 1978 the U.S. has been taking a full look at the immigration and nationality statutes, particularly through the Select Commission on Immigration and Refugee Policy established by Congress. The revision of U.S. immigration law is "beyond the capacity and scope of a single agency of the Executive Branch or Committee of Congress, and must involve a broad spectrum of opinion and groups concerned with immigration reform". In fact, historically, U.S. immigration law and policy has focused on the Eastern Hemisphere and has been shaped primarily by domestic rather than by foreign policy considerations. If a recasting of U.S. immigration law and policy is to take place during the 1980s, a concern for the new source countries of emigration as well as an equal weighing of foreign and domestic policy considerations must be part of it.

For this second symposium on U.S. immigration law and policy, CMS has been fortunate again to have been able to draw upon the expertise of distinguished representatives of the American and Mexican governments and well-known authorities in immigration law and policy from the private sector. The quality of their contributions injects new substance and critical clarifications in the ongoing complex debate concerning the practice and reform of immigration law as well as its implications for national and international policies.

The Editors

In Defense of the Alien: Immigration Law and Legal Representation

1

Opening Remarks

LEONEL J. CASTILLO*

THE key thrust behind this Conference is the rights of both documented and undocumented immigrants in the United States.

It is my contention that the border situation, and the relationship between the United States and Mexico, are now at a stage critical to the Administrations of both the U.S. and Mexico and, consequently, to the U.S. Immigration and Naturalization Service.

We at the INS are extremely concerned that the apparent deterioration of this situation not be allowed to continue.

At the border crossing between El Paso and Juarez hundreds of Mexicans protesting a current INS crackdown on violators of immigration law blocked the bridges and tore down American flags. A ten year old girl, Laura Patricia Fabela Chavez, was among the crowd, but, I am certain, little understood why she was there. She was killed by a vehicle attempting to push through the blockade. A nine year old boy, Martin Acosta Chavez, was seriously injured. The woman driver of the car was pulled from her vehicle and severely beaten.

Near Laredo, firemen were called to extinguish a fire in a late model car. When the fire was out they made a grisly discovery in the car trunk. Two men, later identified as undocumented aliens being smuggled into this country, were burned beyond recognition. The driver and others in the car panicked when the fire broke out, and they fled without allowing those locked in the trunk an opportunity to escape.

During the month of January, INS officers in Laredo reported that at least eight persons drowned attempting to cross the river to make an unlawful entry into the United States. There may have been other victims whose bodies were not discovered.

Recently in the Chula Vista area south of San Diego three Mexican

* At the time of this Conference, Leonel Castillo served as Commissioner of the Immigration and Naturalization Service, a post from which he has since resigned.

Nationals were shot in confrontations with U.S. Border Patrol Officers. One of the aliens has died.

Although statistics are not kept on incidents such as these, there is no doubt that they are growing. The Southwest border, which has had a long history of "wild west" style violence, is becoming even more violent. Tempers flare quickly and frustrations are evidenced by the anger that seems prevalent on both sides.

I am asking that fuller investigations be conducted of all incidents of violence, and of all allegations of harsh or discourteous treatment by INS officers. I should add that the Border Patrol is an especially well disciplined unit, which in recent years has arrested more than 800,000 undocumented aliens annually with few allegations of mistreatment.

I am also asking that our local officials seek closer cooperation and better communication with their Mexican counterparts across the border. The El Paso District Director and I have discussed the possibility of informing Mexican officials when the next close check of immigration documents is contemplated, so that they will be aware of and prepared for possible reaction by their citizens.

Furthermore, I am continuing our program of improved treatment of Mexicans and others who have been arrested for unlawful entry or presence in the United States.

I am proud of our record of achievement. In the past two years we have moved a long way from such actions as "Operation Wetback" and the raids in the depression era when thousands of people were rounded up and forced across the border.

It is my belief that enforcement of the immigration laws should go hand in hand with respect for basic human rights. Other federal agencies and organizations have cooperated and coordinated efforts with the INS to insure that the legal rights of all aliens be safeguarded. The Justice Department has directed its energies to examining instances of civil rights violations against documented and undocumented aliens, as well as violations against citizens. The Department of Labor's Wage and Hour Division has increased its capacity to draw the full and fair payment of wages due apprehended aliens.

Also, the INS has worked extensively with Foreign Consuls in their attempts to secure all wages due any individuals required to leave the country. I intend to continue our program to improve treatment of Mexicans and others who have been arrested for unlawful entry or presence in the United States.

Efforts have been directed toward upgrading the living and recreational facilities in many of our detention centers by improving sanitary conditions,

medical facilities, dining rooms and recreational rooms. I believe that these changes are necessary and crucial items essential to operate a detention center fit for maintaining and holding humans. Despite the additions of some of these modern advancements, I have received considerable attacks from the public, from some members of Congress, and even from within the INS.

However, no matter how diligently we concern ourselves with due process and no matter what pains we take to ensure proper treatment of those we apprehend, a major problem will remain at least for the immediate future.

The United States is currently experiencing the world's largest temporary migrant worker program. It is larger even than the guest worker programs of Switzerland, France, Holland and Germany.

This is clearly a world phenomenon; people leaving their own countries to seek jobs elsewhere. It is happening in Europe, in Asia, and in South America. Colombians are entering Venezuela looking for jobs and people from Guatemala are entering Mexico.

In the U.S. these movements result in the Immigration Service arresting over a million persons annually, and detaining over 300,000 each year. Their crime is that they want to work in this country.

In my view, there are possible changes in the law that could relieve that situation, to the benefit of our own country and the nations that are the sources of most of the undocumented.

These legal changes would include a provision penalizing employers of undocumented aliens; and an expanded program that would allow undocumented aliens to enter the U.S. legally and occupy jobs temporarily when workers cannot be found in the United States. In addition, the quotas for permanent immigration from Mexico should be altered to allow at least the level of immigration that existed two years ago, so that families who are separated by our border can be reunited without waiting months or years.

These are immediate needs. They cannot wait for two years or more while the new Select Commission on Immigration and Refugee Policy studies this problem, makes its report, and proposes legislative changes.

I believe the talks between President Carter and Mexican President Jośe Lopez Portillo were indicative of the immediacy of the problem and of the need to prevent relations between our two countries from drifting unevenly toward animosity.

The talks were extremely important because they reopened the dialogue between the two countries, and they could not have occurred at a better time.

Little research has been done to date on the effect of undocumented workers on the economy. Some researchers have contended that a majority

of the jobs held by undocumented aliens are those positions that Americans do not wish to take. In a recent report conducted by the Center for Labor and Migration Studies for the Social Security Administration, it was estimated that if 1,000,000 undocumented workers were covered in employment they would be contributing $565,256,000 annually to the Social Security Fund.

The talks between President Carter and President Lopez Portillo, as well as the incidents at the border have helped to focus attention on the border situation and the relationship between Mexico and the United States. Public concern in both countries should be aroused so that the attention warranted will be focused upon the problem.

One solution, tried with mixed success, still offers opportunity for greater accomplishments. That is the "Twin Plant" concept, through which parts for products are manufactured in the U.S. and assembled or finished in Mexico. These factories, located at the border, have attracted people to this high unemployment area. Many have become discouraged and entered the United States without papers.

We recently completed a study that could have an important impact upon employment in Mexico. The study pinpoints eight areas in Mexico that are the major areas of origin for undocumented aliens in the United States. I support locating the "Twin Plants" in those areas, to provide employment for the neediest people and to relieve the attraction to the overpopulated border area.

Despite what we may have read, relationships between Mexico and the United States have generally been healthy. I believe they can be better. If we work together to solve some of the problems, we can achieve the most harmonious relationship between any two major countries in the world.

I believe that changes in the law, providing for increased immigration and for temporary workers where the need for them is proven, should enable Mexicans to walk into the United States with their heads held high, rather than hiding in the trunks of cars, subject to accident, suffocation and mistreatment by smugglers. With a better attitude on both sides of the border, Americans should be able to enter Mexico without fear, to conduct business or simply to enjoy some of the attractions of this beautiful country.

A great deal was written about President Carter's trip to Mexico. Yet, much of the discussion between the two Presidents was not made public. It is known, however, that a major portion of their talks was devoted to the subject of unlawful immigration. Commitments were made to find realistic long-term solutions which would respect the dignity and human rights of these people, as well as the social, economic and developmental problems that unlawful immigration involves. It was agreed that the Joint Consultative Mechanism should meet promptly to work on this situation.

Of course, trade between the countries was a part of this talk, especially in relation to the immigration problem. I believe this is the issue which holds the key not only to immigration, but also to other concerns that exist between the U.S. and Mexico.

Similarly, I look for mutual benefits from renewed attention and conversations on trade and development with other major sending countries of undocumented aliens.

In reviewing the conference program, I am pleased by the breadth of concerns and issues to be covered. I applaud your attention to the rights of aliens and assure you that respect for those rights is an integral policy of the Immigration and Naturalization Service.

2

Basic Rights of Aliens

AUSTIN T. FRAGOMEN*

THE Immigration and Naturalization Service (INS) is charged by Congress through the Immigration and Nationality Act (the Act) with enforcement of the immigration laws of the United States. Almost invariably the Service's enforcement activity focuses on the undocumented alien. In carrying out their duty, officers of the INS apprehend and effect the departure of hundreds of thousands of such aliens each year. Notwithstanding the serious consequences of deportation proceedings and their inherent penal nature such proceedings have consistently been termed "civil". As a result the alien is deprived of the full measure of constitutional safeguards that are granted to a defendant in a criminal prosecution.

However, certain provisions of the United States Constitution necessarily afford the alien some measure of protection in that the rights derived under these provisions are applicable to all persons within the United States to protect the rights of society as a whole. The Fourth Amendment protects all persons within the borders of the United States from unlawful searches and seizures. Therefore, this protection applies to lawful as well as undocumented aliens. In addition the Fifth and Fourteenth Amendments guarantee due process of law to all persons in the United States. The Fourteenth Amendment also provides that all persons shall receive equal protection under the law.

Despite the mandate of universal protection implicit in this constitutional language, the courts and the INS have been reluctant to apply the full measure of these protections to aliens. The extension of constitutional principles and safeguards to immigration proceedings is a relatively new area of the law. Until approximately three years ago it was generally assumed that immigration officers, whether they were assigned to the Border Patrol or to the Investigations Branch, had more or less *carte blanche* authority to stop and interrogate any person anywhere. Although substantial judicial confusion still exists in regard to arrest and detentive questioning by INS officers, certain standards have been established.

* Adjunct Professor of Law, New York University School of Law and Brooklyn Law School, practicing attorney, Fried, Fragomen, Del Rey and O'Rourke.

The basic authority of INS officers to interrogate, detain and arrest aliens is set forth in Section 287 (a) of the Act. However, the powers conferred by Congress upon INS officers must be interpreted as coterminous with the Fourth Amendment protection against unlawful searches and seizures.

Section 287 (a) (3), the Border

The state of the law regarding the authority of immigration officers to stop and interrogate persons at the border proper is well established by historical tradition. The scope of this authority is further extended by Section 287 (a) (3) of the Act which empowers an immigration officer, within a reasonable distance from any exterior boundary of the United States, to board and search for aliens any vehicle, vessel, aircraft or other type of conveyance. The broad license conferred on INS officers in this section has been held by the Supreme Court in the landmark decision of *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) to be limited in its exercise to border crossing points or the functional equivalent thereof. Functional equivalency has been defined as a particular location at which one could not reasonably arrive without having transversed the border. The *Almeida-Sanchez* rationale permits INS officers to man border posts or to establish regular check stations or to stop persons at the functional equivalent of border crossing points.

Roving Patrols

In delineating the scope of the immigration officer's authority to stop and interrogate persons beyond the border proper but while still within the vicinity of the border, the state of the law becomes more complex. Section 287 (a) (1) permits immigration officers to interrogate any alien or any person believed to be an alien as to his right to be or to remain in the limited status. This section provides the underpinning for the authority of INS officers, via the roving patrol method of operation, to stop a vehicle and question the occupants. However, it is commonly held that any stop of a moving vehicle by a law enforcement officer constitutes a seizure which must be justified under the Fourth Amendment. Random stops of vehicles by roving patrols have thus been condemned as an unreasonable interference with an individual's right to be free from government harassment, *United States v. Brigoni-Ponce*, 422 U.S. 873 (1975). Nevertheless, the intrusion incident to brief investigatory stops has been deemed sufficiently modest so as to warrant something less than the finding of probable cause traditionally required to support a seizure. The standard utilized in a roving patrol situation makes it incumbent upon the arresting officer to have a founded or reasonable suspicion to believe the occupants of the seized vehicle are undocumented aliens. The officer must be able to set forth the articulate

facts upon which this suspicion was based, together with rationale inferences from these facts.

In extending the suspicion test to the stop of a moving vehicle, the Supreme Court enumerated a variety of factors which might be considered in determining whether a reasonable suspicion exists in a given case. The Court stated explicitly that the mere observance of the occupant's foreign appearance would not be sufficient to justify either a reasonable belief that they are aliens or a reasonable belief that they are illegally present in the United States. *U.S. v. Brigoni-Ponce, supra.* The standard evolving from this decision has been termed the "foreign appearance plus" test, something more than foreign appearance alone being required to support a reasonable suspicion. The relevant cases since *Brigoni-Ponce* have thus far eluded the promulgation of a cohesive guideline to be applied in assessing exactly which factors, in conjunction with foreign appearance will satisfy the suspicion test.

Applying the standard enunciated in *Brigoni-Ponce,* the Fifth Circuit in *United States v. Villareal,* Section 565 F.2d 932 (5th Cir. 1978) addressed itself to a factual situation in which a roving patrol stopped a vehicle on information received from radar sensors. The sensors indicated that two vehicles were traveling north from the border in close proximity to each other for about an hour. The officers observed a CB antenna on the lead vehicle and the occupants appeared to be of Mexican descent. As the vehicle approached the patrol car, the passenger ducked beneath the dashboard. From this information the Court concluded that the officers had reasonable suspicion to stop the vehicle, despite the fact that it occurred on a highway frequented by tourists and despite indications in the record that the officers did not observe the CB antenna nor the apparent Mexican descent of the occupant, nor the passenger ducking until after signaling the vehicle to stop.

In *United States v. Saenz* 578 F.2d 643 (1978) sensors indicated that two vehicles were traveling north from the unpatrolled border area in tandem fashion for approximately 70 miles at an hour in which local ranchers and tourists did not travel. There was only one occupant in each car and testimony indicated that the foregoing factors were common to smuggling operations. The vehicles had out-of-county license plates and one was covered with dust and mud though there had been no rain that day. The arresting officer testified that the driver of this car appeared to be nervous, frequently glancing in the rearview mirror and driving in a swerving pattern. The Court stated in footnote that although it was not clear whether the officers knew before the car was stopped that the subject appeared to be Mexican, there were sufficient factors to give rise to reasonable suspicion without that observation.

Fixed Checkpoint

The differences between a roving patrol and a fixed check point are significant in determining the propriety of a stop of a moving vehicle by INS officers. The Supreme Court has taken the position that the government's significant interest in effectively preventing the illegal entry of aliens into this country overrides the slight intrusion involved in brief routine stops performed at permanent check points, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). However, there are certain minimal requirements which must be met in order to substantiate the validity of any given check point. The motorist must have advanced warning that he will have to stop at a particular point. It would appear that it is necessary to indicate to motorists that this is for an official governmental purpose, preferably designating that purpose in advance. Moreover, the vehicular traffic must be sufficiently heavy so as to preclude even a brief scrutiny of passing vehicles by officers in roving patrol cars. The flow of traffic must also be too heavy to permit the particularized study of a given car necessary to ascertain whether it is a possible carrier of illegal aliens. It is essential that each checkpoint be independently justifiable under these standards. It is not sufficient that the Immigration Service has established this checkpoint as part of an overall network.

Thus, at the border or in the vicinity of the border there are border inspections or inspections at the functional equivalent thereof, roving patrols and fixed or permanent traffic checkpoints. The powers of immigration officers to stop and interrogate persons at border points or their functional equivalent are extremely broad. Fixed or permanent traffic checkpoints meeting the mandated requirements endow the officer with powers almost as broad as those at the border. Roving patrols at points beyond the border or its functional equivalent must have founded or reasonable suspicion upon which to predicate a brief investigatory stop of moving vehicles.

Section 287 (a) (1), Urban Areas

The *Brigoni-Ponce* standard of reasonable suspicion based upon articulate facts other than foreign appearance extends to encounters between immigration officers and aliens in urban areas as well as border patrol situations. However, the application of this standard to non vehicular situations has given rise to conflict between two views of the constitutionally permissible scope of authority vested by 287 (a) (1) which theoretically vary only to a subtle degree. Thus, while it appears well settled that any detention for questioning, however brief, requires reasonable suspicion of unlawful presence in the country the threshold issue of whether it is unlawful for an INS officer to approach on reasonable suspicion of alienage alone remains unresolved.

Section 287 (a) (1) vests officers of the INS with authority to interrogate an alien or any person believed to be an alien as to his right to be or to remain in the country. The scope of that grant of authority has been held to be limited by the structures of the Fourth Amendment. In *United States v. Brigoni-Ponce, supra*, the Supreme Court held that the Fourth Amendment prohibits stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens. The Court specifically reserved decision on the question of whether officers may also stop persons reasonably believed to be aliens when there is no suspicion that they are illegally in the country.

Courts both before and since the decision in *Brigoni-Ponce* have applied Fourth Amendment limitations to Section 287 (a) (1) in cases outside the context of an interrogation pursuant to a vehicular stop. In *Au Yi Lan v. INS*, 445 F.2d 217 Cert. denied 404 U.S. 864 (D.C., 1971) the District of Columbia adopted a distinction between an officer's mere questioning of a cooperative individual and an officer's detention of an individual against his will for the purpose of interrogation. Although the Court found both types of questioning authorized by Section 287 (a) (1), it held that the Fourth Amendment required that a forcible detention of a temporary nature for the purpose of interrogation be based upon "a reasonable suspicion not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country". Mere questioning without threat of force was held to require only that the officer have reason to believe the individual is of alien origin.

The distinction drawn in *Au Yi Lan, supra*, was further refined by the same court's opinion in *Cheung Tin Wong v. INS*, 468 F.2d 1123 (D.C. Cir. 1972). In this case the court held that reasonable suspicion was present where the arresting officers observed two men of apparent Asian ancestry, one of whom wore a white shirt typical of busboys, in the vicinity of a Chinese restaurant. The two men hailed a cab and as the one wearing the white shirt got in the back seat the other gave instructions to the driver. The arresting officers testified that they concluded from this that the passenger could not speak English. Given the Asian appearance of the individuals, together with their proximity to a Chinese restaurant notorious for employing undocumented aliens and factors indicating an inability to speak English, the court held the evidence sufficient to justify founded suspicion. Since knowledge of English is not a prerequisite for documented aliens (indeed, only a modicum of English is required for naturalization), an inability to speak English or a preference for a foreign language should be insufficient to trigger a reasonable suspicion that the individual is an undocumented alien. Therefore, although the question was not specifically addressed in *Cheung*, the fact that language ability was relevant in finding reasonable

suspicion indicates by implication the court's acceptance of the officer's authority to stop a person based on suspicion of alienage alone.

In *Ojeda-Vinales v. INS*, 523 F.2d 286 (2d Cir. 1975) the INS received an anonymous telephone call informing it that a certain named alien was working illegally. When the immigration officer went to investigate, the owner of the business provided direct evidence of employment. The alien's own statements provided the additional evidence needed to establish probable cause for the arrest. The court in a *per curiam* opinion held that the anonymous phone call provided sufficient grounds for initiation of the investigation in that the information received, if true, established a violation of immigration laws. Quoting from the opinion in *Au Yi Lan*, supra, the court stated that Section 287 (a) (1) permits officers to interrogate and temporarily detain an alien upon reasonable suspicion that he is illegally in the country. However, the issue specifically involved in this case was addressed to the legality of the arrest rather than the initial encounter which does not appear to have been detentive. It is uncertain whether the second circuit is actually adopting the distinction articulated in *Au Yi Lan*. As this is a *per curiam* opinion, the court does not elaborate on its intention and the ambiguities therein remain to be resolved.

The Seventh Circuit has joined the D.C. circuit in promulgating a rationale which conceptualizes viriant definitions of the term interrogate. Thus in *Illinois Migrant Council v. Pilliod*, 5481 F.2d 715 (7th Cir., 1977) the Seventh Circuit modified a preliminary injunction against the INS and issued an order *in banc* prohibiting an agent:

> "who does not have a belief based on articulate facts, that a person he wishes to interrogate is illegally in the United States, from detaining that person by force, threat of force, or a command based on the agent's official, but not prohibiting the agent from questioning that person, within such detention, concerning his right to be in the United States, if the agent reasonably believes the person to be an alien." *Illinois Migrant Council v. Pilliod*, 548 F.2d 715 (7th Cir., 1977) [order entered upon rehearing *in banc*), modifying 540 F.2d 1062 (7th Cir., 1976)]

It appears, therefore, that under the rules enunciated by the District of Columbia, and the Seventh Circuit, an immigration officer may casually question an individual who is free to cooperate or not, when the person is suspected only of being an alien, documented or undocumented. In order to detain that individual the officer must have reasonable suspicion that the alien is unlawfully in the United States. When it is considered that refusal to cooperate or an attempt to evade the "casual encounter" or even the appearance of nervousness may well be held to elevate the initial basis for confrontation to the level sufficient for detention [(*see*, e.g., *Au Yi Lan v.*

INS, supra, 445 F.2d at 220, C.F. *San Gan Lee v. INS,* 590 F.2d 497 (3rd Cir., 1979)], the odious import of this rule becomes apparent.

The problems of characterizing an encounter as a temporary forcible detention or mere casual questioning would seem to be inapplicable to situations involving moving vehicles. Since any stop of a vehicle is a seizure under the Fourth Amendment, casual questioning of the occupants becomes a theoretical impossibility. Therefore, a vehicular search would ostensibly have to be predicated on reasonable suspicion of illegal alienage. The establishment of divergent standards for vehicular and non vehicular situations has the anomalous and undesirable effect of affording greater protection to aliens who happen to be in moving vehicles while exposing pedestrian factory workers and restaurant workers to the intimidation of so-called "casual" interrogations.

Recognizing the artificiality of this position a district court within the Second Circuit, in the landmark decision of *Marquez v. Kiley,* 436 F. Supp. 100 (S.D.N.Y., 1977), has held that INS officials may approach persons to inquire into their citizenship status only on a reasonable suspicion based on specific articulate facts, that the person may be an alien who is illegally in the country. In addressing this issue the court acknowledged the reality that an immigration officer confronting an individual is necessarily an intrusive and detentive circumstance by virtue of his power and authority.

Upon careful examination of the relevant case law in the area the Court of Appeals for the Third Circuit in *Shan Gan Lee v. INS,* 590 F.2d 497 (3rd Cir., 1979) announced yet another standard for determining the validity of investigatory stops. In this case, Immigration Officer Hughes approached two persons conversing in Chinese, in the vicinity of a Chinese restaurant known for employing illegal aliens. Both men wore clothing typical of restaurant kitchen help and upon Hughes' identifying himself as an Immigration Officer, one of the men, Lee, became nervous and without speaking attempted to walk away. At that point Hughes told Lee to stop and made a direct inquiry upon his status. The Court took note of the conflicting standards for mere questioning as opposed to detention *cum* interrogation and adopted a new formulation requiring a determination of whether the stop and interrogation were reasonably related in scope to the justification for their initiation. Thus the factors relied on by the officer in deciding to approach Lee and his companion justified a reasonable suspicion that the two were aliens and aroused a suspicion in the officer's mind that they were undocumented aliens employed at the Chinese restaurant nearby. Hughes' stop and interrogation of Lee in response to Lee's apparent nervousness and attempt to extricate himself from interrogation was, therefore, reasonably related in scope to the justification the officer had for adopting that response.

THE ALIEN AND THE FIFTH AMENDMENT

In addition to the issues encountered in regard to the application of Fourth Amendment rights, the interrogation and detention of aliens also raises substantial due process problems under the Fifth Amendment. Again due to the characterization of deportation proceedings as civil in nature, the alien facing deportation is without the panoply of constitutional rights, which criminal defendants enjoy. Thus it has been held that the Fifth Amendment warnings given to criminal suspects which grew out of *Miranda v. Arizona* (the Miranda warnings) are not mandated at the inception of an interrogation of an alien as to his or her status. This has been held to be the state of the law even in situations involving custodial interrogations. *Cordon de Ruano v. INS*, 554 F.2d 944 (9th Cir., 1977); *Trias-Hernandez v. INS*, 528 F.2d 366, (9th Cir. 1975). Of course when the inquiry is directed at determining whether there has been a criminal violation the Fifth Amendment is implicated and Miranda warnings are required *U.S. v. Campos-Serrano*, 430 F.2d 173 (7th Cir., 1970) *aff'd on other grounds*, 404 U.S. 293 (1971).

Although under the existing state of the law an alien is held not to be entitled to Miranda warnings by virtue of the attachment of Fifth Amendment privileges, the INS by its own regulations has imposed on its officers the requirement of administering similar Miranda-type warnings. According to 8 CFR 287.3 (1978):

> "An alien arrested without warrant of arrest shall be advised of the reason for his arrest and his right to be represented by council of his own choice, at no expense to the Government. He shall also be advised that any statement he makes may be used against him in a subsequent proceeding and that a decision will be made within 24 hours or less as to whether he will be continued in custody or released on bond or recognizance."

However, despite the well established precept that the Service must comply with its own regulations, *Bridges v. Wixon*, 326 U.S. 135 (1945), *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the failure of Service officers to abide by the operation directives requiring Miranda-type admonitions was never directly considered as violative of due process. In the case of *Trias-Hernandez v. INS, supra*, the Court of Appeals for the Ninth Circuit reviewed the language of 8 CFR 287.3 and concluded without explanation that it neither required the use of Miranda warnings nor did it provide for comparable admonitions.

In 1977 the issue of due process interests in the minimal warnings mandated by the Service regulations was, for the first time, carefully considered and thoughtfully analyzed by a court in the case of *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir., 1977). While stating that Miranda warnings *per se* are not

applicable in a deportation setting, the First Circuit held that agency failure to abide its own regulations requiring similar type warnings violated due process even in the context of a civil proceeding. The Court quoted portions of the opinion in *Bridges v. Wixon, supra*, wherein the Supreme Court stated:

> "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty — at times a most serious one — cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Navia-Duran v. INS, supra*, at p. 808, quoting *Bridges v. Wixon*, 326 U.S. 135 at 154 (1945).

In the most recent decision on this issue, a district court within the Ninth Circuit, in *Belljho v. Sureck*, ___F. Supp.___(C.D. Cal., No. CV 78-1912-WMB, December 28, 1978) has reiterated the position of the First Circuit that compliance with 8 CFR 287.3 is essential to the safeguarding of an alien's right to due process. Upon examination of the language of the regulation, the Court concluded that Section 287.3 rights apply only when a warrantless arrest has been made and, a custodial interrogation which does not amount to an arrest does not trigger the regulation. The crucial question becomes whether an 'arrest' has occurred.

In a motion to reconsider, filed in *Belljho*, the government stated that 8 CFR 287.3 was in the process of amendment. The proposed amendment, since enacted as published in the Federal Register effective January 1979, specifies that an alien's right to be informed of the privileges encompassed in the regulation, attaches only after the examining officer has determined that formal deportation proceedings will be instituted. The inescapable inference to be drawn from this is that an alien's right to be appraised of his constitutional privileges rests solely on the protection afforded by administrative regulations rather than on due process guarantees as rooted in lasting constitutional principles. Clearly this has the objectionable result of ascribing such amorphousness to due process as to render its boundaries subject to change with each new issue of the Federal Register.

Beyond the events of interrogation and detention in the context of the deportation hearing proper, it has been held that during the proceedings the defendant alien need only be given some of the procedural and substantive protections generally encompassed by the due process clause. In deciding what specific protective rights the due process clause provides to aliens, courts have historically examined the deportation proceeding under scrutiny from the standpoint of fundamental fairness. *U.S. v. Floulis* 457 F. Supp. 1350 (W.S. Pa., 1978); *Bridges v. Wixon, supra.*

In holding invalid a deportation order resulting from a hearing which proceeded despite the absence of the alien's retained counsel, the court in *Chlomos v. INS*, 516 F.2d 310 (3d Cir., 1975) enumerated the following requisites for due process in deportation proceedings.

1) reasonable notice of the charges
2) the privilege of counsel
3) the opportunity to present evidence and cross-examine witnesses; and
4) a decision of deportability based upon reasonable, substantive and probable evidence.

Until recently the courts have consistently held that failure to conform to agency regulations subjected a deportation order to attack only if it constituted a denial of fundamental fairness. *U.S. v. Floulis, supra.*

In *U.S. v. Calderon-Medina*, 591 F.2d 529 (9th Cir., 1979) the Court of Appeals for the Ninth Circuit rejected both the government's contention that a regulation violation renders a deportation unlawful only if it denies due process or fundamental fairness, and the district court's holding that conformity with applicable laws and regulations must be judged without inquiry into the prejudice caused to the defendant. The Court concluded that violations of a regulation renders an order for deportation unlawful only if it is demonstrated that the violation prejudiced interests of the aliens which were protected by the regulation. Applying this standard the Court then declined to invalidate the subject deportation order for failure of the INS to notify the detained alien of his right to communicate with his country's diplomatic officers as required by INS regulations.

The Exclusionary Rule

Of paramount concern to any discussion of the rights of aliens is the reach and scope of the Fourth Amendment prohibition against unreasonable searches and seizures as encompassed in the exclusionary rule. This rule operates as an extension of the four in amendment protection against summary searches and seizures by forbidding the use of illegally obtained evidence. Evidence obtained pursuant to an illegal search or arrest, whether it be corporeal or statements made during such activities, are inadmissible in a court of law. For over half a century the question of this rule's place in a deportation setting, while often the subject of contention, has generally been presumed to be settled in favor of its application.

In 1923 the Supreme Court, in the frequently cited decision *U.S. ex rel Bilo Bilokumski v. Tod*, 263 U.S. 149 (1923), stated *in dicta* that "It may be assumed that evidence obtained...through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings". In the

wake of that decision the many district and circuit level cases acknowledge the applicability of the exclusionary rule to deportation proceedings as a matter of course. *Schenck ex rel Chon Fook Hong v. Ward*, 24 F. Supp. 776 (D.C. Mass. 1938); *Vlissidis v. Anadell*, 262 F.2d 398 (7th Cir. 1959); *Klissis v. INS*, 361 F.2d 329 (D.C., Cir. 1966); *Ho Chong Tsao v. INS*, 538 F.2d 667 (5th Cir. 1976). Without expressly ruling on the issue, many decisions have dealt with evidentiary challenges poremised on allegations of illegality in a manner which necessarily implies acceptance of the rule's viability in the deportation setting. *See*, e.g. *Katris v. INS*, 562 F.2d 866 (2nd Cir. 1977); *HuertaCabrera v. INS*, 466 F.2d 759 (7th Cir. 1972); *U.S. v. Nazario-Castulo*, No. 78. Cr. 899-CSH (S.D.N.Y., filed Februarv 23. 1979).

In 1977, in the case of *Wong chung Che v. INS*, 565 F.2d 166 (1st Cir. 1977), the First Circuit specifically addressed itself to whether improperly obtained evidence may be admitted at a deportation hearing and resolved that it could not. The court relied on the fact that while no authority could be found which would make evidence obtained in violation of the Fourth Amendment admissible, the available authority assumed a favor its inadmissibility (citing Gordon and Rosenfield, *Immigration Law and Procedure*, Section 5.2G p. 5—31; *Huerte-Cabrera v. INS* 466 F.2d 759 (7th Cir. 1972, *et al*).

Despite the weight of authority in favor of the rule's application, the state of the law regarding the exclusionary rule's applicability to the "civil" deportation proceeding remains unsettled. In a prime example of the maxim "bad cases make bad law", the Board of Immigration Appeals, amidst obfuscation and delay, has recently reversed the Service's long standing position and declared the exclusionary rule inapplicable to deportation proceedings. *Matter of Sandoval*, Int. Dec. 2725 (August 20, 1979). Remarkably, the Board concludes after only brief discussion that there is a paucity of relevant decisions on the issue and for this reason addresses the question as one of first impression. Without any satisfactory explanation for the abrupt departure from long acceptance of the rule, the Board premises its rejection of the exclusionary rule on the civil nature of deportation proceedings. There is no language in the constitution which makes a distinction between unreasonable searches and seizures either when they are part of a criminal process or when they are part of the civil process. Yet the Board justifies the evisceration of the alien's Fourth Amendment protections based on just such a distinction. The dissenting opinion of Board Member Irving A. Appleman points out the incongruity of the majority's position in that under this stance:

> "the government may have a criminal action against an alien for violation of (Immigration laws) thrown out because of fatally contaminated evidence, and turn right around and proceed against him in a deportation proceeding of equal or greater consequences

relying on the identical evidence. This is wrong. *"Matter of Sandoval,* Int. Dec. 2725 (August 20, 1979), Dissent p. 12.

It thus appears that as long as deportation proceedings are relegated to the civil side of the law, courts will continue to endorse lesser standards of constitutional protections for aliens as consonant with the label affixed to such proceedings and in disregard to the realities of the situation. It is to be hoped that in the future more attention will be paid to the *nexus* between criminal sanctions and deportation. Perhaps then the quasi-criminal nature of the deportation proceeding will be recognized and provide the basis for affording the alien constitutional protections commensurate with the seriousness of the consequences involved.

3

Employment Rights of Aliens Under the Immigration Laws

SAM BERNSEN*

EMPLOYMENT rights of aliens under U.S. immigration laws cover a variety of situations ranging from the lawful permanent resident to the undocumented alien.

A nonimmigrant who works without authorization is subject to deportation.[1] If he was admitted under a bond to assure maintenance of nonimmigrant status, unauthorized employment may result in forfeiture of the bond.[2] In 1976, a new dimension was added to these penalties.[3] By amendment of Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, acceptance of unauthorized employment prior to filing an adjustment application for permanent resident status under that section makes him ineligible for adjustment, unless he is an immediate relative of a U.S. citizen.[4]

An alien who engages in unauthorized employment does not commit a criminal offense and the employer of the alien is not in violation of Federal law. Several attempts in the Congress to enact legislation to penalize employers of aliens not authorized to work have failed.[5] However, several states have enacted such laws. These include California, Connecticut, Delaware, Florida, Kansas, Maine, Massachusetts, Montana, New Hampshire, Vermont and Virginia. Puerto Rico and Las Vegas also have such laws. The Supreme Court has held the state enactments to be constitutional if they do not conflict with Federal law.[6]

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[1] 8 U.S.C. 1251 (a) (9).

[2] 8 CFR 103.6 (b) (2).

[3] Act of October 10, 1976; P.L. 94–571, Section 6.

[4] 8 U.S.C. 1255 (c).

[5] H.R. 16188 (1972); H.R. 982 (1975); S. 3074 (1976); H.R. 9531 (1977); S. 2252 (1977).

[6] *See, De Canes v. Bica,* 424 U.S. 351 (1956).

LAWFUL PERMANENT RESIDENTS

An alien who has acquired the status of lawful permanent resident under the immigration laws is accorded the privilege of residing permanently in the United States.[7] The law is silent as to whether an immigrant can work, but there has never been any question that the right to engage in employment is inherent in the nature of the privilege.

This does not mean that the right to work of an alien lawfully admitted for permanent residence is entirely unqualified. If the alien was admitted as an immigrant on the basis of a labor certification issued under Section 212 (a) (14) of the Immigration and Nationality Act, 8 U.S.C. 1182 (a) (14), he is not free to ignore the terms of the certification and take employment in a job for which he was not certified. An alien who takes uncertified employment risks deportation.[8] On the other hand, where the alien, in good faith, "reports to work and accepts the employment, he may still quit after a while because he does not like the work or because he has received a better offer elsewhere".[9]

As yet unresolved is the question whether an immigrant who was admitted with a defect in his immigration visa is authorized to work. The defect may be discovered years later and he may be subject to deportation proceedings on the grounds that he was inadmissible at the time of entry.[10] If the employment is deemed unauthorized despite admission with an immigrant visa, the alien will be ineligible for relief from deportation through adjustment of status. Such a construction of the statute would appear to be clearly inconsistent with the intent of the Congress. When Section 245 (c) was enacted into law to preclude adjustment of status for certain aliens who accept employment, it was designed to deter nonimmigrants from violating the conditions of their admission.[11] Moreover, it has always been recognized that admission with an immigrant visa confers work authorization and is inherent in the privilege of residing permanently in the United States.

Nonimmigrants

In the case of an alien admitted temporarily in one of the 12 nonimmigrant classifications,[12] work authorization may be inherent in the alien's classification, or he may have a classification in which he can request and receive employment permission from the INS. Otherwise, a nonimmigrant is not authorized to work.[13]

[7] U.S.C. 1101 (a) (20).
[8] *Matter of Fotopoulos*, 13 I&N Dec. 847 (BIA. 1972).
[9] *Matter of Cardoso*, 13 I&N Dec. 228 (BIA. 1969).
[10] 8 U.S.C. 1251 (a) (1).
[11] House Report No. 94—1553, Page 12.
[12] 8 U.S.C. 1101 (a) (15).
[13] *8 CFR 214.1 (c)*.

EMPLOYMENT AUTHORIZATION BASED ON NONIMMIGRANT CLASSIFICATION

International Organization Aliens

A—1, A—2 and A—3 are the visa symbols for foreign government officials such as ambassadors, ministers, consuls and their servants and the immediate families of these persons.[14]

G—1, G—2, G—3, G—4 and G—5 are the visa symbols for representatives to, and employees of, designated international organizations such as the United Nations, Asian Development Bank, etc. The servants, as well as the immediate family of the principal, are also assigned a "G" classification.[15]

The principal alien is expected to work in the capacity in which he is employed by his foreign government, or by the international organization, and the servant is expected to serve the principal.

The family members can be authorized to work only if they change to an immigrant classification or to another nonimmigrant classification in which employment is permitted. However, if a family member works while in A—1, A—2 or A—3 status, the Service is not in a position to consider the work as a violation if the State Department continues to accept the alien as having official status. If the State Department advises the Service that the alien has lost official status for any reason, including acceptance of unauthorized employment, the alien may be subject to deportation proceedings.[16]

However, in some cases, employment of members of the principal's family may be permitted without loss of nonimmigrant status. If a family member wishes to inquire regarding permission to engage in gainful private employment in the U.S. while in official status, he should request his embassy or international organization to communicate with the Visa Office, Department of State, concerning the matter.[17]

G—4 Dependents

Under a recent INS regulation, the general rule was changed for G—4 dependents.[18] Work permission now can be granted to the dependent G—4 spouse, son or daughter of a G—4 employee of an international organization. The son or daughter must be an unmarried dependent and must be residing habitually with the employee.

[14] 8 U.S.C. 1101 (a) (15) (A). 22 CFR 41.12 lists all nonimmigrant visa symbols.

[15] 8 U.S.C. 1101 (a) (15) (G).

[16] O.I. 214.2 (a) and (g). O.I. means INS Operations Instructions.

[17] *Id.*

[18] 8 CFR 214.2 (g) (2) 43 FR 33229, July 31, 1978.

Application for work permission by a G—4 dependent is submitted on Form I—566 to the Visa Office of the State Department in Washington, D.C. If the principle G—4 alien is employed by the United Nations, the application is submitted to the United Nations in New York City. Two supporting documents must be attached to the application: 1) a certification by the international organization that the applicant is the unmarried dependent son or daughter of an employee of the organization; and 2) a statement from the prospective employer giving the job, title, duties, salary and verification and the applicant qualifies for the position.

If a favorable recommendation is made by the Visa Office or the U.S. Mission to the U.N., the application may be approved by the appropriate INS district director. The District Director, Washington, D.C., is the approving official for other than United Nations family members. For U.N. cases, the approving official is the District Director, New York City.

The recommending and approving official must be satisfied that the principal alien and the applicant are in lawful status; that the proposed employment is not in a job for which there is an oversupply of qualified U.S. workers; and that the employment would not be contrary to U.S. interests.

There is an oversupply of U.S. workers if the occupation is listed on Labor Department Schedule B (20 CFR 656) or if the Labor Department otherwise determines that there is an oversupply in the area of proposed employment. However, a full-time student is not subject to this restriction. Such a student can be granted work permission regardless of the labor supply situation if the employment is part-time, not exceeding twenty hours per week, or not exceeding twelve weeks at a time during school holiday periods. In addition, an alien granted full-time work permission in a Schedule B occupation before August 30, 1978, may continue in such occupation for two years from that date.

Employment may be considered contrary to U.S. interests if the applicant has a criminal record, violated the immigration laws, worked illegally or is unable to show that he paid income taxes from previous U.S. employment. However, the illegal employment provision will not be held against an alien working without permission on August 30, 1978, if the alien applied for work permission within ninety days of that date. An applicant is eligible for work permission if the principal alien will be stationed in the U.S. six months or less.

Work permission may be granted in increments of not more than two years each. The applicant will be informed on the decision by letter. If the application is approved, the Internal Revenue Service and the Department of Labor will be informed.

If the application is denied, no appeal is permitted. However, a motion for reconsideration may be submitted.

A—1 and A—2 Dependents

A regulation similar to the one in effect for G—4 dependents has been proposed for dependents of A—1 and A—2 aliens. However, approval of the application is contingent on the alien's government permitting similar employment opportunities by spouses and unmarried dependent sons and daughters of U.S. diplomatic and consular officials and employees of similar rank stationed in the alien's country, 44 FR 5669, January 29, 1979. There is no proposal for such employment permission for dependents of representatives to international organizations.

Crewmen

A crewman is an alien serving in good faith in any capacity required for normal operation and service on board a vessel or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and intends to depart from the U.S.[19] A crewman can work on his vessel in U.S. port so long as the work has a direct relationship to the normal operation of the vessel. For example, a crewman may load ship's stores, but not cargo.

D—1 classification is for a crewman who must depart on the same vessel. D—2 is for a crewman whose discharge has been authorized by INS.

Temporary Employees and Trainees

There are a few categories of "H" aliens.[20] H—1 is for persons of distinguished merit and ability coming to the United States temporarily to perform services of an exceptional nature requiring such distinguished merit and ability.

H—2 is for other workers coming to the United States temporarily to perform temporary services in occupations in which there is no shortage of American workers.

The H—3 classification if for temporary trainees.

The H—4 classification is for the spouses and children who accompany or follow to join the worker or trainee. H—4 aliens are essentially visitors for pleasure assigned a nonimmigrant classification, similar to that of the principal for ready identification and to enable them to obtain admission and extension of stay for the same period as the principal. H—4 aliens are

[19] 8 U.S.C. 1101 (a) (15) (D); 8 CFR 252.

[20] 8 U.S.C. 1101 (a) (15) (H); 8 CFR 214.2 (h).

not allowed to work. If they engage in employment, they violate status and are subject to deportation.

A visa may not be issued to an "H" alien unless a petition on Form I—129B has been approved by the Service. The petition if filed, together with a $10.00 fee, with the District Director having jurisdiction over the place where the services will be performed or where the training will be received. If the services will be performed in more than one place, the petition may be filed with the District Director having jurisdiction over any of those places. One petition may cover any group of aliens who will be performing the same type of services or who will be receiving the same consulate, and will be working or training in the same immigration district.

The only "H" alien for whom a labor certification must be requested is the H — 2 alien. The certification must be requested in the case of the H — 2 alien because the statute provides that H — 2 classification can be accorded only if unemployed persons capable of performing the work involved cannot be found in this country. Also, in the case of the H—2 alien, the work itself must be of a temporary nature.

Before April 7, 1970, the law required that the work performed by an H — 1 alien must also be temporary in nature. However, the H — 1 provision was amended by the Act of April 7, 1970, P.L. 91—225, so that the temporariness of the work is not relevant. All "H" aliens, however, must intend to come for a temporary period.

Admission of foreign medical graduates is severely restricted. H—1 classification is available only if the foreign medical graduate is coming primarily to engage in research or teaching for a non-profit organization. Patient care incidental to the teaching of research is permissible.[21] H—2 and H—3 classifications are available to a foreign medical graduate. The restrictions on the three H classes apply to a graduate of any medical school, including a school in the U.S. or Canada, but not a graduate of national or international renown. If an alien in the United States desires to perform temporary services or training for another petitioner, a new petition on Form I—129B must be submitted.

Special mention should be made of petitions for entertainers. Entertainers are frequently brought to the United States to perform in different places. The agent who files the petition for the entertainer may specify in the petition all of the places where the entertainer will perform. Upon approval of the petition, the services of the entertainer are restricted to the activity, area and employer specified in the approved petition. Any engagement not specified in that petition requires a new petition. Also a new petition is required if the entertainer's services are engaged by a new employer or by a

[21] Act of October 12, 1976; 90 Stat. 2301.

new agent. In these days of charity shows and talk shows, there is also a special rule for those situations. A new petition will not be required for the appearance if an alien performs on a *bona fide* charity show without compensation if he is already in the United States under an approved petition. Also, a petition is not required for an appearance, interview or demonstration without remuneration by any nonimmigrant who is not an entertainer by occupation.

In the event of a labor dispute involving a strike or other work stoppage in an "H" alien's occupation at his place of employment, work permission is automatically suspended.

International Company Transferees

The L—1 classification is accorded to an international intra-company transferee.[22] The L—2 classification is accorded to the principal's spouse and children accompanying or following to join him. Before a Consul may issue an L — 1 visa, a petition in behalf of the alien must have been approved by the Service. The L—1 alien is expected to engage in employment as the visa was issued on the basis that he was to be employed in a managerial, executive or specialized knowledge capacity. However, as in the cases of H—4 aliens, neither the spouse nor the children of the L—1 alien may accept employment in an L—2 classification.

Treaty Traders and Treaty Investors

E—1 classification is for a treaty trader who is defined as an alien coming to the United States under a treaty between the U.S. and the country of the alien's nationality solely to carry on substantial trade principally between the U.S. and the Treaty country.[23]

E—2 is a treaty investor who is coming to the United States under a treaty between the U.S. and the country of the alien's nationality solely to develop and direct the operation of an enterprise in which he has invested, or is actively in the process of investing, substantial capital.[24]

The spouse and children of the E—1 alien are also classified E—1. Spouse and children of the E—2 alien are classified E—2.

A treaty trader or investor classification may be accorded to an employee of a treaty person or organization if the employee is engaged in executive or supervisory duties or has special qualifications. The principal alien is authorized to work by virtue of his classification. However, the INS does

[22] 8 U.S.C. 1101 (a) (15) (L); 8 C.F.R. 214.2 (l).
[23] 8 U.S.C. 1101 (a) (15) (E); 8 C.F.R. 214.2 (e). [24] *Id.*

not consider that the family member has violated status by engaging in employment and will not require the family member's departure if the principal alien maintains E—1 or E—2 status.[25]

Information Media Representatives

Representatives of foreign press, radio and TV are classified as "I" aliens.[26] Their spouses and children are accorded the same classification symbol. The principals are expected to work in the capacity in which they have been assigned to the United States. As in the case of dependents of treaty aliens, INS does not consider that the family members have violated status by engaging in employment and will not require them to depart while the principal maintains his status.[27]

Visitors for Business

B—1 is the temporary visitor for business.[28] The alien can do certain kinds of work that is considered to come within the definition of business. Examples are: 1) take orders for goods manufactured abroad; 2) negotiate contracts; 3) consult business associates; 4) perform H—1 services, other than as an entertainer, if the alien qualifies for H—1, provided he will receive no salary or pay from a U.S. source (expense allowance permitted); 5) obtain training for which he could be classified as H—3, provided the alien continues to be employed abroad, continues to receive his salary from abroad and is not paid a U.S. salary (expense allowance permitted); 6) perform personal services if the alien is a servant accompanying or following to join a U.S. citizen who lives abroad permanently, provided the alien has been employed as a servant by the U.S. citizen abroad and the U.S. citizen is visiting the U.S. temporarily; and 7) compete for prize money (not salary) as a professional athlete.

NONIMMIGRANTS WHO CAN REQUEST WORK PERMISSION

Students

F—1 classification is for the nonimmigrant student coming to the United States to take a full course of study at a school approved by the Service.[29] F—2 classification is accorded to the spouse and children of the student who

[25] O.I. 214.2 (e).
[26] 8 U.S.C. 1101 (a) (15) (I); 8 CFR 214.2 (i).
[27] O.I. 214.2 (i).
[28] 18 U.S.C. 1101 (a) (15) (B); 8 CFR 214.2 (b).
[29] 8 U.S.C. 1101 (a) (15) (F); 8 CFR 214.2 (f).

accompany or follow to join him. The dependents are not permitted to work.

An applicant for a student visa must establish that he is financially able to pay the cost of his studies and stay in the United States. The wife and children are not authorized to engage in any employment. The student is permitted to accept on-campus employment if a U.S. resident will not be displaced. Authorization from the Service to accept such employment is not required. For off-campus employment, an F — 1 student requires permission.

There are two off-campus situations — economic necessity and practical training. Permission to engage in employment because of economic necessity or for practical training may be granted only by the Service.

Economic necessity for part-time employment may be authorized upon showing that there has been a change in the financial situation of the student due to unforeseen circumstances. The application for permission to accept such employment is made on Form I—538. The application must be endorsed by a school official who certifies the student is taking a full course of study and that part-time employment will not interfere with the student's ability to carry successfully a full course of study. If the application is granted, the student may engage in part-time employment not to exceed 20 hours per week while school is in session and without such limit during vacation periods. Approval of employment on the grounds of economic necessity is valid for the period of the student's authorized stay.

Practical training employment permission is also requested on Form I—538. An authorized school official must certify that the proposed employment is recommended for the practical training of the student in his field of study and that it is believed the training will not be available in the student's country. Practical training may be authorized in increments of six months each, not to exceed twelve months in the aggregate. Under a more restrictive rule for vocational, business and language schools, only three months practical training may be authorized for each twelve months of attendance at such schools.

Any permission granted a student to engage in employment is automatically suspended while a strike or other labor dispute involving a work stoppage or layoff is in progress in his occupation at the place of employment.

Exchange Aliens

J—1 classification is accorded to the participant in a designated exchange program [30] and the J—2 classification is accorded to the principal's spouse and children accompanying or following to join him. The J—1 alien can

[30] 8 U.S.C. 1101 (a) (15) (J); 8 CFR 214.2 (j); 22 CFR 63.

work only if permissible under the terms of the approved program.

J—1 students may be permitted by the sponsor to accept summer employment (even if not specifically provided for in the program) and practical training. Permission to work rests with the sponsor who is responsible for assuring compliance with the terms of the approved exchange program. Requests for work permission in the case of J—1 aliens are not submitted to INS. A school having an exchange program may authorize part-time employment during the school year for a J—1 alien student if employment is required because of urgent financial need which has arisen since the time of visa issuance and if the employment will not interfere with participating in a full course of study. The part-time employment must have the written approval of the responsible officer of the exchange program. "Part-time" is not defined for exchange students.

The J—2 spouse and children may be granted permission by INS to accept employment in the U.S. only if such employment is for the support (including customary recreational and cultural activities and related travel) of the spouse and children. Employment permission may not be granted for the support of the principal alien. The application is made to the District Director where the alien is residing temporarily and it need not be made in writing.[31]

Foreign medical graduates coming to the United States under an exchange program for graduate medical education or training are subject to special restrictions.[32] An accredited medical or other health professional school must agree in writing to provide or assume responsibility for the alien's education or training. Any participating affiliated hospital must join in the agreement. The school must be satisfied that the alien is a graduate of a U.S. or Canadian medical school or has passed Parts I and II of the National Board Examination or its designated equivalent,[33] is competent in oral and written English, is adaptable to U.S. culture and has adequate prior education. Practice of medicine under State license and specialty board certification, as of a date prior to January 1, 1977, are deemed equivalent to passing the examination. The alien must make a commitment to return to his home country and the Government of his country must give written assurance that there is a need in that country for the skills the alien will acquire. The alien's stay is limited to two years. One extension for an additional year may be granted at the written request of the Government of his country.

[31] 8 CFR 214.2 (j).

[32] Act of October 12, 1976, 90 Stat. 2301, and Act of August 1, 1977, 91 Stat. 394.

[33] The designated equivalent is the Visa Qualifying Examination (VOE). The VOE will be held annually in the U.S. and abroad. For information contact Educational Commission for Foreign Medical Graduates, 3624 Market St., Philadelphia, Pa. 19104; Tel (215) 386—5900. Cable EDCOUNCIL, Philadelphia.

FIANCE[E]S OF U.S. CITIZENS

A/K — 1 classification is accorded to a fiance(e) who is the beneficiary of an approved visa petition filed by a U.S. citizen.[34] Since a fiance(e) is actually an intending immigrant who is permitted to enter temporarily for the purpose of marriage which would qualify the alien for permanent residence, it is the Service view that acceptance of employment by a K — 1 alien prior to becoming a lawful permanent resident is permitted. Similarly, the children accompanying, or following to join, the K — 1 alien, who are accorded K — 2 classification, are also permitted to work.

NONIMMIGRANTS FOR WHOM EMPLOYMENT IS PROHIBITED

A nonimmigrant who is in the United States in the status of a visitor for pleasure (B—2), or as an alien in transit (C—1), may not engage in employment.[35] F — 2 dependents of students,[36] H — 4 dependents of temporary workers and trainees[37] and L — 2 dependents of international company transferees[38] may not accept employment.

EMPLOYMENT WHILE AN APPLICATION IS PENDING

An applicant for adjustment of status to permanent resident may request that his Form I—94 (Annual-Departure Record) be stamped "Employment Authorized".[39] The application must be properly executed, the filing fee must be attached and the alien must be *prima facie* eligible for adjustment.

Although acceptance of employment after proper filing does not disqualify an alien for adjustment, the employment endorsement may facilitate obtaining a job and a social security number. The endorsement also prevents any question about whether any subsequent employment is authorized.

"An H—1 alien whose authorized stay has expired, but who has filed a timely application for an extension of the H—1 stay with the same employer, may continue to perform previously authorized work for that employer while his application for extension is pending and such employment will not be considered as unauthorized."[40] Presumably, the H — 1 alien was cited as an example to illustrate the point. Thus the policy would also apply in H — 2,

[34] 8 U.S.C. 1101 (a) (15) (K); 8 CFR 214.2 (k); O.I. 214.2 (k).

[35] 8 CFR 214.1 (c).

[36] AINS Form M — 201, par. 4.

[37] 8 CFR 214.2 (h) (1).

[38] 8 CFR 214.2 (l) (1).

[39] O.I. 245.9; INS Telegram of Sept. 22, 1978 (C.O. 245—P).

[40] 41 FR 56873, December 30, 1976.

H—3 and L—1 cases and in any other cases where an alien continues previously authorized work while his extension application is pending. In Matter of *Dacanay*, I.D. 2590 (BIA, 1977), the policy was expanded to include an extension application by an "H" alien for different employment, if the "H" petition is approved. The same principal would appear equally pertinent to a timely application for change in nonimmigrant classification (e.g. F—1 student to H—1 temporary worker) if the application is approved.

REFUGEES

Aliens who have entered the United States as conditional entrants, or who have been paroled as refugees, are automatically granted work permission at time of arrival by endorsement on their Form I—94.[41]

An alien in the United States who is granted asylum is granted work permission on request.

UNDOCUMENTED ALIENS

Form I—94 may be endorsed "Employment Authorized" upon request, when voluntary departure is granted to:

1) an admissible alien who is actively seeking an immigrant visa at a U.S. Consulate, if an immigrant visa is available to him within 60 days; [42]
2) an alien for whom a preference petition was approved as a member of the professions or as a person of exceptional ability in the sciences or arts, if his priority date is before August 9, 1978; [43]
3) a Western hemisphere native who was in the United States on December 31, 1976, if on that date he was and continues to be the adult unmarried son or daughter of a U.S. citizen, or the spouse of an unmarried son or daughter of a lawful permanent resident alien;[44]
4) an alien in whose case there are compelling factors;[45]
5) a Western hemisphere native who is registered on an immigrant visa waiting list as of a date prior to January 1, 1977, and who last entered the United States prior to March 11, 1977;[46]

[41] 8 CFR 242.5 (a) (2) and (3); 43 FR 29528, July 10, 1978; O.I. 235.11 (b).
[42] 8 CFR 242.5 (a) (2) and (3); 43 FR 29828, July 10, 1978.
[43] *Id.*
[44] O.I. 242.10 (a) and (b).
[45] 8 CFR 242.5 (a) (2) and (3); 43 FR 29528, July 10, 1978.
[46] O.I. 242.5.

6) a deportable alien in whose case deportation will not, or cannot, be enforced, such as an alien who was granted suspension of deportation under Section 244 of the Immigration and Nationality Act, 8 U.S.C. 1254,[47] or withholding of deportation under Section 243 (h), 8 U.S.C. 1253 (h).[48]

Despite the absence of express statutory authority to grant work permission, INS has found that such benevolent authority is implied in the broad power granted by the Congress to administer the immigration laws.

[47] O.I. 244.3 [48] O.I. 243.5.

4

Rights of Aliens to Due Process in Deportation and Exclusion Proceedings

PETER SCHEY*

THE due process rights of persons in deportation proceedings basically emanate from either a constitutional or a statutory basis. Some of these rights also overlap, one often finds that there is a statutory basis which provides a particular right which would exist even in the absence of such a statutory basis. Various rights would barely exist solely by reason of constitutional mandate. The fundamental constitutional mandate is the Fifth Amendment, Due Process Clause. The Fourteenth Amendment has no application to the federal government. Although the Fourteenth Amendment also contains due process protection, it is protection only against the state. The Fifth Amendment Due Process Clause determines the extent of the protections which people are to receive in virtually any type of proceeding or interaction with the government in the United States.

One of the problems that an attorney runs into early, is the fact that the due process clause is like a glass of water without the glass — it is very difficult to quantify, and very difficult to define. In fact, the cases of the Supreme Court indicate that due process is a continuously changing concept; it is something that depends upon the social values of the time. It has been defined as fundamental fairness; it has been defined as providing equal treatment to people; and it is usually defined by abstract adjectives which relate to the norm of societal values. One judge may think something violates due process while another may not, consequently, it is not easy to be specific.

There are a few overriding rules, however, upon which one can almost always rely. One such rule is that government agencies must follow those statutes which mandate their missions, practices and policies. If the immigration lawyer can show that an agency has failed to follow statutes, he or she not only has a clear case of policy of practice which is inconsistent with the statute, but generally the courts will hold that it is a violation of due

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process. The same is true with regulations.

Such a case was reported in my circuit. The INS had done everything correctly up to the final moment. Then they failed to advise me, the defendant's attorney, that they were deporting my client. There happens to be a section in the Code of Federal Regulations that says once an attorney has filed a G—28 and is representing a client, the Immigration Service is obliged, anytime they send a notice to the alien, to send a copy to the alien's attorney.

Originally, my client had been found deportable based on a criminal conviction. We had appealed the case to the Board of Immigration and Appeals, but lost and my client was sentenced to four days over a year. If my client had received a sentence that was five days less than negotiated, he would not have been deportable under Regulation. His attorney had agreed to this plea bargain. Even though we had an affidavit from the attorney saying that he did not realize the consequences, this type of collateral attack on the deportation hearings is ineffective. At the time, we thought it was worth a try, but the Board of Immigration Appeals ruled against us.

To appear before the Board, a lawyer has six months to appeal to the Circuit Court of Appeals. Meanwhile, the client can be moved out of the country. If that appeal is filed in the Circuit Court of Appeals, under 8 U.S.C. 1105 (a), the client has an automatic stay of deportation. While we had not yet filed an appeal in the 9th Circuit, the six months had not run out. During the six month period the government sent my client a notice that said — "Come on down; bring your bags; this is a free trip". And he took that free trip — south.

Next, we appealed in our Circuit, with many interesting jurisdictional issues, but the due process issue that was raised in the case was "did he have a due process right to have his attorney advised that he was being told to leave the country". The government claimed that the 9th Circuit had no jursidiction because the defendant was out of the country. The 9th Circuit, however, disagreed. Moreover, the claimant's due process rights were violated by not advising his attorney that he was being moved out of the country. The 9th Circuit then ordered the Immigration Service to allow the defendant to come back into the country.

The substance of the decision was that the Immigration Service failed to follow their own regulations. This tactic should be used whenever possible. Don't try to argue some constitutional point because the constitutional protections are not very credible today. The courts are not going to view the constitutional protections with the same kind of shining light that an attorney would, and the more one practices in front of the courts nowadays, the more recognizable this is. It is better to move to the more simple argument that the Immigration Service's conduct violates a statute or their

own regulations. A judge does not have to be convinced that there is a fundamental fairness problem. In this atmosphere, the Supreme Court is not very sensitive or sympathetic to due process. They act on a basically subjective judgment without basic fairness. If there is a way to eliminate the constitutional argument or at least have as a backup arguement that conduct violates the regulation, the case is much simpler and more likely to succeed.

Certain kinds of fundamental due process rights are recognized as existing in deportation hearings. Probably one of the most important is the right to counsel, an important aspect of a fundamental fair hearing. *Goldberg v. Kelly*, a United States Supreme Court case, and innumerable other cases confirm that a fair hearing requires that one be provided the assistance of counsel. Earlier in this century, there was a specific bar to attorneys being present in expulsion hearings. Now, of course, this has changed. Returning resident aliens and people claiming citizenship have a due process fundamental right to have an attorney at exclusionary hearings.

There are two areas in which the right to counsel is a persistent problem in the context of deportation hearings. One is obtaining continuances. The present INS regulations state that a defendant is entitled to one continuance to procure an attorney. Under emergency or unusual situations further continuances are granted to obtain counsel. Many attorneys tend to use this as a delaying tactic, sending their clients into the Immigration Service saying that a continuance is needed in order to employ counsel. On the other hand, when the alien requests a continuance to secure counsel and does not get the continuance, in my judgment this generally will be a sympathetic case.

The client comes to an attorney, having now been found deportable. The only thing left to do is go to the Board of Immigration Appeals. There are only ten days to do so. Thus, the area of obtaining continuances is a constant problem.

The second area, in which I have a particular interest because I just settled such a lawsuit, is the validity of the clear statutory preclusion to being represented by counsel at government expense. In two separate places, the statute maintains that counsel will not be provided at the expense of the government. We filed a lawsuit, *Munoz v. Bell*, in which we were very lucky. Our primary argument was that the federal government has funded the Legal Services Corporation to the tune of four hundred million dollars, and that they have funded the Immigration Services to the tune of X million dollars. Many times their offices are about 100 feet apart from each other geographically in a city the size of Los Angeles. Yet an INS agent will be going through the process of deporting someone who needs legal assistance, while legal assistance is being funded by the same person who is paying the salary of that INS agent. Since legal assistance is 100 feet away, it seems to

make basic sense for the person being deported to be referred to that legal assistance, particularly when the same source is funding both. That made sense to this judge. He indicated strongly that his disposition was to rule against the government. The case then went through settlement negotiations and, on February 22, 1979, a national regulation became final which requires referral.

In various cities such as San Francisco, immigration judges traditionally handled this through an informal policy. Judges I considered to be more enlightened did make referrals, but not many.

Quite a number of people, including members of the Border Patrolmen's Association, wrote very strong comments expressing their opposition to Congress. People expressed outrage that federal money was being sent to represent undocumented aliens. The right to counsel issue and the basic question of whether or not people are entitled to representation at government expense is being tried.

A number of circuit courts had ruled that there is no right to representation at government expense. On the other hand, there are some cases, particularly the case of *Zimmer v. INS* which was done by Legal Services in Florida four years ago, where defendants were denied the right to counsel because they did not have the money to pay for it. They went to a deportation hearing and lost. They then employed counsel to represent them at the appeal. There are a number of cases where the Court of Appeals will reverse the case, but generally prejudice must be shown. Actually, the court says that they are reversing not because the person did not have counsel, but because there was some prejudice. The immigration attorney must show the Court of Appeals that there was something that could have happened at that deportation hearing which did not happen.

The attorney has a due process right to know the time and place of the hearing. The regulations say that seven days notice is necessary except in exceptional cases. Generally the Immigration Service will give at least seven days notice, but they are so backlogged, at least on the West Coast, they often give longer notice. The lawyer is obviously entitled to know the place of the hearing. Concerning this, there are some interesting due process issues and, perhaps, this is just among indigent people.

Recently in San Francisco some immigration judges related a story about a man with a bag walking up and down the hall. No one knew what to do with him. He was a Canadian seaman who claimed asylum here seven years ago and had actually been given asylum. Then something went wrong. He was living in Las Vegas where there is a Legal Services but not an immigration judge. An immigration judge comes to Las Vegas only every six months. So the seaman was moved from Las Vegas to San Francisco for his hearing. He could not afford an attorney. The Legal Services claimed to represent only

permanent residents of San Francisco, and thus could not represent the defendant. The Legal Services in Las Vegas would only represent clients at hearings in their region. The defendant was caught in the middle. Financially he qualified for Legal Services, but none would represent him. This is an issue that needs to be looked at very seriously. The question is, does one have a due process right to have a hearing at the place of residence? I believe so, although I do not think there is a definitive answer. If having a person's hearing away from his or her place of residence will prejudice the case, that would be a due process issue on which the case could conceivably be won.

Another question is the due process right to notification and charges. Under regulation and under statute 8 U.S.C. 1252, and under the Fifth Amendment due process one has the right to be advised of the nature of the charges in the order to show cause. Cases have gone up on the question of the current practice of the Immigration Service in using an order to show cause to initiate a deportation hearing and they have held. The order to show cause is sufficiently specific to advise the defendant of the factual legal allegations against him or her. If the charges were not described in the order to show cause with sufficient specificity, then this is probably a good due process case.

Another issue occurs when a person is charged with entering the country without inspection, and at the hearing the charge is changed to an overstayed visitor. The prosecutor then amends the order to show cause. That raises some due process problems. If a complaint or the order to show cause is amended during the hearing, the attorney has a right to a reasonable continuance to prepare for that.

In the actual litigation of the administrative hearing, the deportation hearing, another question that has somewhat intrigued me is whether or not the attorney has a right, at the end of the government's case, to be granted a reasonable continuance to prepare the defense. This is something that the courts may not approve.

Another due process issue which comes up during the course of the hearing is a question about the presumption of the burden of proof. There is a statute, 8 U.S.C. 1361, which outlines the presumptions that will apply and who has the burden of proof in deportation hearings. Very simply, it says that the alien has the burden to prove the time, place and manner of entering. That is not quite so bad as it sounds because of the use of the word alien. First, the government, under 8 U.S.C. 1361, has to establish alienage. Until the government establishes alienage they have not established that they have any jurisdiction even to hold a hearing. Once the government has proved that the defendant is an alien, the burden shifts to the latter to establish time, place and manner of entrance. If the defendant remains silent, a negative inference of unlawful entry or unlawful presence in the

U.S. can be drawn. When a person claims the Fifth Amendment providing self-incrimination there are interesting ramifications and this is actually something we have faced in one case in which we represented 67 workers in Los Angeles. We basically had everybody take the Fifth Amendment and we have won 20 out of 30 deportation hearings up to now. Claiming the Fifth Amendment may get the defendant over the negative inference. There is a rote statement to say in order to claim the Fifth Amendment. It is, "I believe my answer to this question may provide a link in the chain of evidence which could be used to initiate proceedings against me". The key words are "the link in the chain" which could result in being prosecuted. It appears that everybody in the deportation hearings has a valid Fifth Amendment claim. It is a crime to not register; it is a crime to not report your address; it is a crime to not have a green card or I—94 form on your person; it is a misdemeanor to enter without an inspection; it is a felony to do it twice. This pertains to most of my clients, and I believe they can all safely feel, even though we know as a practical matter that they are not going to be prosecuted, that they can still validly take the Fifth Amendment.

At some point INS is going to understand how to give immunity to people properly. It is not a complicated process, but also not so simple as INS seems to think. There is a process to go through with the U.S. Attorney to provide immunity. Once immunity is granted, of course, the Fifth Amendment claim concerning self incrimination is invalid and the court can compel the defendant to testify. Immigration judges can order INS to go to Federal Court to compel testimony. As a practical matter, however, we take the Fifth Amendment; the immigration judge protests; and the trial attorney grants my client immunity. The defendant has to answer the questions. The Immigration Service must then establish deportability by clear, convincing, unequivocal evidence, so that the final burden rests with the Immigration Service.

There are some differences between the due process rights in the deportation hearings as opposed to the exclusion hearing. As a practical matter, my experience at exclusionary hearings has been that INS gives defendants more rights than they have to give them. A person who has legally entered the country barely has any protection of the Fifth Amendment, unless he claims U.S. citizenship or is a returning resident coming back from a short trip abroad.

The question of translation is also important. I represent a lot of people who are monolingual in a foreign language. Obviously, people should be entitled to understand the nature of the hearing, and I believe most judges agree. Those who are monolingual in a foreign language should have simultaneous translation. At present the foreign client only understands the first three minutes when the judge explains his or her constitutional, statutory

and regulatory rights and somebody translates. Then the hearing goes on in English. Thereafter, the only time the client really knows what is happening is when he or she is being cross-examined, and is unable to participate in his or her own defense. The notion of the simultaneous translation of everything, every time an objection is raised or a plea bargained or an issue is pursued is necessary.

Finally, the attorney has the due process right and the statutory right under 8 U.S.C. 1105, 1105 (a) to appeal cases through the Board of Immigration Appeals and from there to the Circuit Court of Appeals. Meanwhile, the client can stay here. One of the issues INS conceded to in the *Munoz* case was that they would advise people of this. Previously people would not appeal their cases because they thought all the work would have to be done from Mexico City. We took the position that Mrs. Munoz was not adequately advised of her right to counsel. She was not referred to an attorney. Secondly, she was not adequately advised of her appeal rights. We won substantial victories there. INS agreed to write out the appeal rights and require a signed waiver. Finally, they agreed to provide it in English and in Spanish. For the alien, this was an important revision in procedure. INS response to that, of course, was that now everybody would be going to appeal their case. Our response was — that's right!

5

Legal Problems Arising At The Consulate

STEPHEN FISCHEL*

THE officers at our consulates overseas encounter many legal problems. In administering the provisions of the Immigration and Nationality Act, the consul must decide whether an individual visa applicant is entitled to the particular visa classification sought and whether the alien is ineligible under any of the various substantive statutory grounds of ineligibility. Before reviewing several of these grounds of ineligibility, it is important to note briefly the unique role the consular officer plays in the visa process.

The Immigration and Nationality Act in Section 104 (a) grants to the Secretary of State general authority to administer and enforce the provisions of the Act. However, it specifically confers upon consular officers those powers, duties, and functions relating to the granting or refusal of visas. As exclusive authority to issue or refuse visas was granted to consular officers, there is no actual Department of State authority over visa applications. Although the officer does possess uniquely broad authority, it is somewhat less than the absolute discretion to issue or refuse a visa on his personal whim or perspective.

Another unique aspect of the visa process is that, in accordance with Section 291 of the Immigration and Nationality Act, the burden of proof rests upon the visa applicant to establish eligibility to receive such a visa. If the applicant cannot establish entitlement to visa issuance, then no visa shall be issued.

Section 221 (g) further emphasizes the authority to refuse a visa:

> No visa or other documentation shall be issued to an alien if: 1) it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa; 2) the application fails to comply with the provisions of

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this Act, or the regulations issued thereunder; or 3) the consular officer knows or has reason to believe that such alien is ineligible to receive a visa.

The consul's authority to refuse a visa on substantive grounds is limited to situations where he or she knows, or the record provides reason to believe, that the alien is ineligible. However, the consular officer must, by regulations, identify the specific statute or regulation on which the refusal is based and inform the alien. The applicant must also be informed of any available administrative relief, such as a waiver of the grounds of ineligibility.

Once a visa has been denied, informal procedures do exist for reviewing the refusal. Under 22 CFR 42.130 (b), a refusal made by consul shall be reviewed at the post by the principal officer or a designated alternate. If this officer does not concur with the refusal, he or she may either submit the case to the Department for an advisory opinion, or assume directly the responsibility for the case. Furthermore, under 22 CFR 42.130 (c), a procedure is established to provide direct review of refusal by the Department of State.

"The Department may request a consular officer in an individual case or in specific classes of cases to submit a report if a...visa has been refused. The Department will review such reports and may furnish an advisory opinion to the consular officer for his assistance in giving further consideration to such cases. If upon receipt of the Department's advisory opinion the consular officer contemplates taking action contrary to the advisory opinion, the case shall be resubmitted to the Department with an explanation of the proposed action. Rulings of the Department concerning an interpretation of law, as distinguished from an application of the law to the facts, shall be binding upon consular officers."

As a result of this regulation, the Department of State reviews visa refusals at the request of attorneys and other interested parties. If the review reveals that the consul committed error, then an advisory opinion is transmitted to the officer explaining the Department's understanding of the case. Although the advisory opinion is not legally binding on the officer's action, it is rare that the Department's opinion is not accepted and followed by the consul.

As stated previously, the alien bears the burden of proving his entitlement to visa issuance. Under Section 212 (a) there are currently thirty-three statutory grounds of ineligibility. They vary from medical conditions to prostitution, deportees, etc.

One of the most frequently applied statutory grounds of ineligibility is Section 212 (a) (9) of the INA. This provision renders ineligible those visa applicants who have been either convicted of or have admitted to the essential elements of a criminal offense involving moral turpitude. It is essential that the crime in question involves moral turpitude. The presence

of moral turpitude is determined in accordance with the moral standards which generally prevail in the United States. The Attorney General and the federal courts have provided adequate definition of moral turpitude, and thus, a turpitudinous crime is considered to be one that is inherently wrong rather than a regulatory wrong, *malum prohibitum*.

The alien must have been convicted of a crime or must admit to having committed a crime. For obvious reasons, admissions are rarely given by applicants. On the infrequent occasion when it does occur, formal and specific procedures must be followed by the consul to minimize any doubt regarding the commission of the criminal offense, and to minimize subsequent conflicting assertions by the applicant. Consequently, the focus of Section 212 (a) (9) is on crimes involving moral turpitude which have resulted in convictions.

Special provisions of the statute and the regulations exempt aliens from the application of this section of law under certain circumstances. Examples of such exemptions include situations in which a person who had committed only one offense was convicted while under the age of eighteen years; if a person was tried and treated as a juvenile for criminal conduct committed under the age of eighteen years; or, if the person was convicted *in absentia*. Federal and State expungement procedures and U.S. pardons nullify the conviction, whereas foreign pardons do not. The statute, also, specifically excludes convictions for purely political offenses from its application. Lastly, if a conviction is for a crime which constitutes a misdemeanor, and is, also, classifiable as a petty offense under [18 U.S.C. 1 (3)], then Section 212 (a) (9) would not attach.

Although a waiver is obtainable within the discretion of the Attorney General for purposes of NIV issuance, a waiver under Section 212 (h) for the issuance of an immigrant visa can only be entertained by the Attorney General if the applicant is the spouse or child of a U.S. citizen or permanent resident alien, or if the applicant has a son or daughter who is a U.S. citizen or a permanent resident alien.

A very important and controversial ground of ineligibility is Section 212 (a) (15) which reads:

> Aliens who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charge.

A finding of ineligibility must be based upon a standard of reason to believe as stated previously. However, for purposes of 212 (a) (15), the statute speaks to the likelihood and not the mere possibility that the alien in question will become a public charge. The consul must weigh all the facts

and circumstances of the case when assessing this likelihood of the individual becoming a public charge.

To establish the unlikelihood of becoming a public charge, the alien submits documentary evidence to the consul setting forth his personal assets and demonstrating that he or she has prearranged employment, affidavits of support, etc. The need of obtaining employment to overcome the provisions of 212 (a) (15) is dependent upon the applicant's assets and financial needs. If an alien is being processed for an immigrant visa, the category which does not require a labor certification, the terms of the prearranged employment must be sworn to on a specific form (PS—1743).

To further supplement the financial evidence presented to the consul, an alien often obtains an affidavit of support from a relative or friend in the U.S. The sponsor sets forth his or her relationship to the applicant and his or her financial capabilities of supporting the alien. The evidentiary weight the consul attaches to the affidavit depends on the relationship of the affiant to the applicant, the financial data presented, and the general credibility of the affiant and the information submitted. It should be noted that the affidavit of support imposes no legal obligation on the affiant to support the alien. At best a moral obligation may be assumed by the affiant. For that reason, also, the consul must consider the closeness of the relationship between the sponsor and the applicant.

When the consul has determined what the income of the prospective immigrant is, that figure is compared with the income poverty guidelines which are published periodically by the Community Services Administration. The guidelines generally indicate the income levels which may permit a person to qualify for welfare or public assistance income. The fact that the applicant's income falls above or below the level set forth in these guidelines does not conclusively result in the consul's decision that the individual will or will not be likely to become a public charge. These charts are only guidelines and are intended only to assist the consular officer in reaching a decision. The consul must review all the facts and circumstances in a case to determine the application of 212 (a) (15).

Pursuant to Section 213 of the Act, the consular officer may, in a borderline case, request the applicant to post bond. This procedure is not frequently used.

It should be remembered that Section 212 (a) (15) does not constitute a permanent ground of ineligibility. The alien may always submit additional evidence in the attempt of overcoming this section of the law, and visas are often issued after presentation of new evidence.

Certainly, one of the most unpopular but frequently applied sections of law is 212 (a) (19) of the INA. That section reads:

> An alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact...

This section is divided into two clauses. The latter clause: "Any alien who seeks to enter the United States by fraud or by willfully misrepresenting a material fact" is written in the present tense, and concerns misrepresentations made at port of entry to the United States. The alien would not be permanently ineligible for visa issuance for violation of this clause. However, the first clause which reads: "Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation by fraud, or by willfully misrepresenting a material fact" refers to making a misrepresentation to a government official in order to obtain issuance of a visa and does result in rendering the alien permanently ineligible for visa issuance.

The consular officer encounters daily opportunities to determine whether this section of law is applicable in a given case. He must assess the facts to ascertain whether the three necessary elements are present; namely, the alien must have made a misrepresentation, he must have done so willfully, and the misrepresentation made must be material.

The misrepresentation must have been practiced on a government official, *i.e.*, a consular officer. It may be an oral statement, a written statement on the visa application itself, or it may be included in evidence submitted in support of an application. Although not necessary under the law, the consul often seeks to have the alien sign a statement to provide documentary proof of the applicant's oral misrepresentations.

The requirement of willfullness is met by showing that the alien was aware of the nature of the information sought and knowingly made an untrue statement. This rarely becomes a controversial issue.

The determination of materiality is the central focus of most inquiries and questions. Materiality is assessed, in light of all the facts and circumstances of a case, to ascertain whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa. In *Matter of S___ and B___C,*[1] the Attorney General defined materiality by stating that a misrepresentation is material if either: 1) the alien is excludable on the true facts; or, 2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might have resulted in a proper determination that he be excluded.

The first part of this definition concerns those cases where the true facts of a matter reveal a situation rendering the alien *ipso facto* ineligible for a visa as a matter of law. A frequent example is when an alien fails to disclose his

[1] *See. Matter of S___ and B___C,* 9 I&N. Dec. 447.

or her conviction for a crime involving moral turpitude which would, as a matter of law, render him or her ineligible for visa issuance.

Most problems arise in the second part of the definition which is called the "rule of probability". In essence, this relates to the "probable" significance of the information concealed by the misrepresentation to the resolution of the visa application. The consular officer must exercise his judgment, upon review of all the facts and circumstances of the case, to determine whether the misrepresentation tended to cut off a line of inquiry or had the capacity to foreclose further investigation of the facts which in all probability might have resulted in a proper refusal of a visa if the truth had been known. For example, if an applicant misrepresented the fact that he or she was convicted of a criminal offense involving moral turpitude because the applicant believed it to be a purely political offense, his misrepresentation is considered to be material, and the consul must weigh certain intangible factors to determine if the alien is excused from the provisions of Section 212 (a) (9) as one convicted of a political offense.

Within the discretion of the Attorney General, a waiver is obtainable for issuance of a NIV if the alien is found ineligible under Section 212 (a) (19). Acquisition of a waiver for IV issuance under Section 212 (i) is available, if the applicant is a spouse, parent, or child of a U.S. citizen or a permanent resident alien.

Finally, the first of the two clauses of Section 212 (a) (23) requires a conviction for illicit possession of marijuana or narcotics, which are listed in the statute; and for various other violations of the narcotics laws, such as sale, trafficking, manufacture, etc. Under the second clause, a determination of ineligibility may result if the consul knows or has reason to believe that the applicant is or has been a trafficker of drugs listed in the statute.

Because the Act provides no waiver provision for immigrant visas for those considered ineligible under 212 (a) (23), regardless of the applicant's relationship to U.S. citizens or permanent resident aliens; the aliens and their attorneys seek to prove that this section of law does not attach in their cases.

The alien often first seeks, by submission of court records and pertinent statutes, to prove that the conviction was for use of marijuana rather than possession. As the language of the law speaks only to possession and other violations and does not specifically list "use", it has been determined that a conviction merely or exclusively for the use of marijuana does not subject an alien to the harsh consequences of 212 (a) (23).

Secondly, for those aliens convicted of drug offenses in the U.S., the alien may demonstrate that he or she is beneficiary of one of two federal expungement procedures, the Federal Youth Offenders treatment (18 U.S.C. 5021) or the first offender statute (21 U.S.C. 844). The Attorney General and

certain Board of Immigration Appeals decisions initially stated that these federal statutes are the only expungement procedures which permanently vitiate a conviction in this section of law. However, recent decisions have extended the expungement of convictions to those state procedures which are comparable to the two specific federal statutes. Namely, the state statute must be specifically a youth offender or a first offender statute, and must treat the offenders in the same manner as the federal statutes. State expungement statutes which are general in nature and foreign expungement statutes do not qualify for purposes of 212 (a) (23).

Another popular means of attempting to avoid the application of 212 (a) (23) is to argue that *Lennon v. INS*[2] is applicable in a particular case. Lennon was in the process of being deported for his conviction under the United Kingdom's Dangerous Drugs Act of 1965 for possession of drugs. However, the court ruled that the required conviction under Section 212 (a) (23) must be for "illicit possession", thus making "guilty knowledge" a relevant element of the conviction within the scope of 212 (a) (23). The court analyzed the British statute under which Lennon was convicted and found that knowledge was not relevant for conviction. Thus, a person could be convicted of possession of a narcotic whether or not the defendant in fact knew what he or she had in his or her possession. The statue, in effect, imposed absolute liability. The court, consequently, found that persons who were convicted under that British statute were not excludable under 212 (a) (23) as knowledge was irrelevant to the conviction. As a result of this case, many aliens sought to prove that their convictions under foreign statutes are similar to the Dangerous Drugs Act of 1965 in the *Lennon* case. However, no foreign statutes reviewed to this point, including those purportedly patterned after the British law, have been found to hold knowledge to be irrelevant. Consequently, the *Lennon* decision has not had the worldwide impact that had been anticipated.

[2] *See, Lennon v. INS*, 527 F.2d 187.

6

In Defense of the Aliens[1]

H.E. HUGO B. MARGAIN*

THE rights of migrants and aliens probably stands as the most important diplomatic and social issue between the United States and Mexico today.

The issue of undocumented Mexican workers in the U.S. emerges as one of the key topics during the recent Presidential visit to Mexico. I witnessed these talks, and I can assure you that they were constructive, and took place in an amicable atmosphere where all issues were frankly debated.

One of the major problems in Mexico is the sector of the population without job opportunities. This constant and massive unemployment creates a "push" factor in the phenomenon of the flow of workers from one country to another. In this case, however, we have two factors at work. The "pull" factor originates in the United States, where there are certain types of employment in which the American workers cannot or do not wish to participate. American workers prefer the protection of social services; services we envy, and do not have yet in Mexico. According to Professor Cornelius of Massachusetts Institute of Technology, because U.S. workers will receive unemployment and welfare checks, they do not have a real incentive to work at unskilled jobs. On the other hand, Mexican workers are willing to accept these types of employment. They come to the U.S. because there are not enough jobs in Mexico and because they find economically rewarding job opportunities in the U.S. Now, we think that we have found a way to minimize this pull factor and give employment opportunities to everyone.

During the worldwide oil crisis, Mexico discovered new sources of oil in the southern part of the country. These fields are yielding an enormous amount of crude oil along with the associated natural gas.

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[1] Highlights of the speech given by the Ambassador of Mexico, H.E. Hugo B. Margain, entitled "In Defense of the Aliens", held in Washington, D.C., on March 29–30, 1979.

At the time of the energy boycott in 1973 and 1974, Mexico was a net oil importer country. It imported 60,000 barrels of crude oil a day from Venezuela and 17,000 additional barrels from refineries in the United States and other countries. In 1975, Mexico became self-sufficient. This change began slowly, and now Mexico is a net oil exporter. Presently, we are exporting 700,000 barrels of oil a day. During the oil crisis of 1973 and 1974, Mexico produced half a million barrels a day. Now the daily production is 1.7 million barrels a day. Next year's goal is to reach a production of 2.25 to 2.50 million barrels of oil a day. At that point we are going to stop to think about the most beneficial step for Mexico.

If a country's only source of revenue comes from oil and gas, as in many of the Third World countries, the economy becomes distorted. This should be avoided. With our present resources, we can develop our country at a rapid pace. A great deal of attention is going to be given to the poorest regions of the country where we have our biggest problem. During the agrarian reform in the 1920s and 1930s, each family was given twenty hectars of land irrigated solely by rainfall. Presently, there are five or six families and their children living on each lot. From these plots stems the greatest emigration to the cities.

Mexico City has turned into an enormous capital. At the beginning of the century it had about 600,000 people. Now it has twelve to thirteen million inhabitants. When the Mexican revolution began in 1910, the total population of the country was fourteen million inhabitants. Presently, the country's population is sixty-four to sixty-five million people. That is, perhaps, the most important factor to remember.

The effort that was made in launching the industrialization program of the 1930s and 1940s was insufficient in spite of the number of jobs devised. There are not enough opportunities for the present work force. According to our statistics, we need at least 700,000 new jobs per year, and we are only creating approximately half that number.

The deficit exists. Unemployment is a reality and in the Third World there is, in addition, disguised unemployment. For example, are the people around the market places who sell a few dozen oranges, or are the people who take tips to protectively watch a car really employed? In fact, this too is unemployment. Now that we have oil and gas in substantial amounts, we shall try to remedy the situation.

Our proven reserves of oil are going up very fast. We now have forty billion barrels of crude oil reserves, and we will most likely reach 200 billion or more. We are shipping oil abroad, with about 75 percent coming to the United States; that is the natural trend of our trade. For instance, last year Mexico traded almost thirteen billion dollars with a deficit of 800,000 dollars. In 1974, the totals were less; about nine billion dollars with a deficit

of two billion dollars. To have a yearly trade deficit was a heavy burden for Mexico. Now that we are shipping crude oil all over the world, and especially to the United States, we think that we are going to compensate for that deficit. We hope to eliminate it and actually to have a surplus. That will give us the means to develop our country.

In the countryside we have a special fund working now. That special fund is called by its Spanish initials, PIDER. In English it means integrated rural development fund. With the support of the World Bank, the Interamerican Development Bank and money from the Mexican government, we supplied PIDER No. 1 with 320 million dollars. PIDER No. 2 has nearly five hundred million dollars. These programs reach the poorest areas all over the Republic of Mexico. With the funds of these PIDER program, plans for modern agricultural development are being carried out.

According to Professor Cornelius, these regions were the sources of the undocumented workers who went to the United States or to the largest cities of Mexico, like Guadalajara, Monterrey or Mexico City. Now the trend has been reversed. The people are happily staying in the agricultural areas because they have jobs, and others from nearby regions go there to work. Mr. McNamara, Director of the World Bank, has expressed a favorable opinion on the assessment of these programs. The Interamerican Development Bank is also in favor of these projects and their results.

Mexico is not only going to continue helping the people of the countryside but it is also going to create enough jobs through the agro-industries and cottage industries for the labor force there. For the people clustered around the cities without real opportunities to find good jobs, we are going to develop a special fund to give them employment opportunities. This will be achieved through the development of labor intensive industries. We believe that Mexico has many good opportunities for progress.

Only ten days ago, President José Lopez Portillo approved the framework for the ten-year program for the rapid development of Mexico. I am confident that we will achieve the target of creating jobs for nearly every Mexican during the 1980s. That would be a great success, but meanwhile we have the problem of too many people in search of working opportunities. This phenomenon of the push factor, together with the pull factor is going to continue for a while.

Concerning civil and human rights, in recent history we have had two different eras. The era that began in August of 1942, and continued, until December of 1964, when I came to the USA on my first tour of duty, was the era of the bilateral agreements. From January, 1965, to the present, no bilateral agreements have been signed and the situation exists only under the laws enforced by the United States, which do not give enough protection to Mexican people.

Reviewing these documents, I must say that I am very proud of the content of the bilateral treaties. The first bilateral agreement was signed in 1942 during the War. It was initiated at the request of the American Government to the Mexican Government to allow the Mexican workers to go to the United States to work. The American labor force was being mobilized for the War. To send workers to the American countryside, to the railroads, to the foundries, or to other activities through this understanding was a gesture of solidarity between the U.S. and Mexico.

On several occasions, when the American workers returned from the War, the Mexican workers in the U.S. were massively deported. Such occurrences must now be absolutely avoided. In speaking of human rights, one must observe the attitude of these two governments on August 4, 1942. They clearly stated in an important document written in Spanish and English, the regulations for the temporary migration of Mexican agricultural workers to the United States. The first premise was temporary job opportunities for Mexican workers who would come to the U.S. to work and then return home. That gave temporary workers the opportunity to earn good wages. At the time, thirty cents per hour was the minimum wage. Mexicans considered those good wages, in comparison with what could be earned in Mexico due to the different stage of development. The workers also achieved something more; they learned a great deal about modern agricultural development.

Now we are competing with the U.S. with vegetables grown during the winter season. Many of the growers here are concerned with quality, prices and the volume of our production. An example is the tomatoes from Sonora. In the past, we grew the mature green variety, but we learned, through the Bracero Program, the name by which these bilateral agreements are know, how to grow the best vine ripe variety. The geographic situation of Sonora is ideal, and we are shipping 50 to 60 percent of the total winter market to the U.S.

The Mexican and U.S. governments agreed to certain conditions in the bilateral agreements. The most important was to give adequate protection to the rights of Mexican workers coming to the U.S. The first condition established that Mexicans contracted to work in the United States would not be drafted into the armed forces. It was wartime and that was a necessary protection for these workers.

The second understanding was that Mexicans entering the U.S. would not be subjected to discriminatory acts of any kind. Racial equality has existed in Mexico since the days of Pope Paul III. At the beginning of the conquest, the Pope declared that the Indians and the conquerors had souls to be redeemed and that they were equal in the eyes of God. The first step of our legislation for racial equality was taken then.

Mexicans were concerned about possible discrimination against them if they were willing to come to the United States. Therefore, the American delegation was asked to accept the important condition that Mexicans "shall not suffer discriminatory acts of any kind". I have had many talks with the Mexican American community, and this tradition helped a great deal with the enormous struggle of the United States to reach equality for its people.

Throughout the bilateral agreement, we protected our workers with rights that even the American workers did not have. Mexicans entering the United States under this understanding would enjoy the guarantees of transportation in Article 29 of the Mexican Labor Law. This meant the extrapolarization of the Mexican law, to be implemented in the United States, to give protection to Mexican people.

The American delegation accepted this condition and certain provisions were stipulated to protect Mexicans in the areas of traveling, expenses, housing and food in the cities and countryside. It was one of the most remarkable laws in favor of the protection of the human being.

Mexicans entering the U.S. under this agreement would be employed neither to displace other workers nor to reduce wages, nor to perpetuate degrading working conditions. That was a guarantee for the workers of Mexico and the United States.

All the documents were written in English and Spanish to further communications and to implement rules of protection through the supervision of our Consuls and Consul Generals.

Now, in 1979, a great deal is said about the rights of the human being. In 1942, we had these important documents in favor of the human rights of the Mexicans coming to the U.S. to work. Since January, 1965, the bilateral agreements have not been renewed and Mexicans without documents are being exploited in the U.S.

When I came for my first tour of duty as Ambassador, I presented my Letters of Credence to President Johnson. My first task was to ask immediately for the possibility of an extension of the last agreement, but this was not feasible. The political pressures against the project were too strong. Therefore, since January, 1965, our countries have not had any bilateral agreements, only the unilateral view and treatment of the problem.

In the next decade, Mexico is going to develop very rapidly. We do not want to see our people going to another country undocumented, and then not returning to Mexico. A temporary stay abroad can be good as proven by the earlier bilateral agreements. Furthermore, a temporary stay would solve the U.S. problem of aliens remaining forever. A bilateral agreement is necessary to solve a common interest problem.

It pleases me that after the recent talks between our two delegations, we immediately assigned a group of experts from the United States and Mexico to study the different ways of handling this problem. We must avoid corruption. There are undocumented Mexicans illegally in the U.S. who pay approximately 200 to 300 dollars to remain. If they do not pay, they are denounced to the immigration authorities and this causes a great deal of suffering. This is done by a sort of "Mafia" which handles this problem in both countries. Both governments strongly condemn these practices. It is necessary to avoid and destroy these activities through a bilateral understanding and common action. The protection of the Mexican workers from such corruption could then be a reality. Presently, workers who come here are afraid to return to their families in Mexico because to re-enter the United States means that they would have to pay again. That is one of the most negative aspects of the present situation. During the days of the Bracero Program, workers traveled back and forth with new contracts each year. It was easy for them to travel to the U.S. and work with peace of mind. According to statistics, farmers in Mexico work only about 100 days a year, during the sowing and harvesting seasons. The remainder of the year they came to the U.S. to work in the countryside and, when finished returned to Mexico. This meant year-round employment.

My opinion favoring the bilateral understanding has a sound basis, in the study of the two epochs, from 1942 to 1964 and from 1965 forward. If we are going to examine the situation of human beings, the first era was the best.

During the important Convention of the United Nations dealing with population and food in 1974, a series of decisions were adopted. At this gathering their were Mexican and American delegations present among the 130 nations from all over the world. Even the socialist countries were represented in Bucharest in 1974. We can read about the problems, the projects and the decisions, such as decision No. 62 (1974): "countries affected by significant numbers of migrant workers are urged, if they have not yet done so, to conclude bilateral or multilateral agreements which would regulate migration, protect and assist migrant workers, and protect the interest of the countries concerned". Then, "the International Labour Organization should promote concerted action in the field of protection of migrant workers in order to give the workers a chance not to suffer".

We have an international document in favor of bilateral or multilateral understanding. I believe that the new commissions, headed in the U.S. by the former Governor of Florida, Governor Rubin Askew, and the Mexican commission, will reach an understanding.

However, the first goal and first priority for Mexico is to protect the rights of Mexican workers in the U.S. to avoid exploitation, suffering and such heartbreaking news as that published recently regarding two workers

who died in the trunk of a car, and the violence resulting from the blockade of the bridge between Texas and Mexico.

We are friendly countries. There are many commendable attitudes between our two countries. Let us avoid the negative aspects of our relationship. Above all, we have the opportunities to work together now to find a way to help people from both our countries.

7

Analysis of Alien Eligibility Under Titles IV, XVI and XIX, Social Security Act

PETER SCHEY*

APPROXIMATELY one in every seven residents of the United States receives Social Security Benefits and over 4 million people are recipients of Supplemental Security Income (SSI). The purpose of the Social Security Act, stated in general terms, is to "provide for the general welfare" of persons within the United States. To achieve this goal, the Act contains a wide range of programs, including retirement insurance, survivor's insurance, disability insurance, hospital and medical insurance for the aged and disabled, supplemental security income, unemployment insurance, and a number of public assistance programs.

This paper analyzes questions involving alien eligibility for benefits under: 1) Title IV, grants to states for aid and services to needy families with children and for child-welfare services; 2) Title XVI, supplemental security income for the aged, the blind and the disabled; and, 3) Title XIX, grants to states for medical assistance programs. This analysis will discuss relevant statutes, regulations promulgated by HEW, and some relevent court decisions on the question of alien eligibility for Social Security benefits.

Title IV

The relevant statutes concerning Title IV are found in 42 U.S.C. Sections 601—610. The Congressional purpose in enacting Title IV was to encourage "the care of dependent children in their own home...by enabling each state to furnish financial assistance and rehabilitation and other services...to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection..."[1] The federal government annually appropriates money

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[1] 42 U.S.C. Section 601.

to States for implementation of the above stated purposes. In order to receive such an appropriation, a State must submit a plan for aid and service to HEW, and such a plan must be consistent with various criteria outlined in 42 U.S.C. Section 602, as amended December 20, 1977, Public Law 95 — 216, Title IV Section 403 (c), 91 Stat. 1561.

Title XVI

Public Law 92—603, enacted by Congress on January 1, 1974, created a new income maintenance program for low income persons. This new program (SSI) is codified at 42 U.S.C. Sections 1381—1393. The federal program replaced previous federal, state and county programs for the aged, blind and disabled, for the purpose of "establishing a national program to provide supplemental security income to individuals who have attained age 65 or are blind or disabled..."[2] The federal government establishes uniform national eligibility criteria guaranteeing a minimum income level to all aged, blind and disabled persons.

States are required to supplement the federal payment for recipients who were receiving assistance under programs before January 1, 1974. This requirement is called "mandatory state supplementation".

In contrast with Retirement, Survivors and Disability Insurance (Title II), which is based on entitlement determined by earnings and quarters worked in covered employment, SSI (Title XVI) is based on need which is determined by the limited income and resources of an applicant/recipient. There are essentially four requirements that must be met by all SSI applicants: 1) the applicant must have certain special characteristics, i.e. at least 65 years of age, blind or disabled; 2) the applicant must have certain common characteristics, i.e. U.S. residency and citizenship, or a certain defined alien status; 3) the applicant's income must be within certain limits; and, 4) the applicant's resources must be within certain limits. This analysis will address the second requirement concerning citizenship and alien status.

Title XIX

Under the medicaid program, the federal government shares with states certain costs of delivering medical assistance to persons whose income and resources are inadequate to pay for health care. The medicaid program is codified at 42 U.S.C. Sections 1396—1396 i. The purpose of the program is to furnish "medical assistance on behalf of families with dependent children; and of aged, blind, or disabled individuals, whose income and resources are

[2] 42 U.S.C. Sec tion 1381.

insufficient to meet the costs of necessary medical services"; and further, to furnish "rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care..." Upon approval of a state plan for medical assistance, the federal government makes payments available to states to implement the medicaid program. Various criteria for state plans are outlined in 42 U.S.C. Section 1396 a. The medicaid program is to be distinguished from *medicare*, a program enacted by Congress as part of the Social Security Amendments of 1965. Medicare is a two part program contained in Title XVIII of the Social Security Act. The first part of this program is called *Hospital Insurance Benefits for Aged and Disabled* and is largely financed by payroll taxes established in the Internal Revenue Code. The second part of this program is a voluntary supplementary program covering the costs of physicians' services and other costs not covered by the first part of the program. This second part of the program is called *Supplementary Medical Insurance Benefits for the Aged and Disabled* and is financed primarily through monthly premiums from enrollees, and matching contributions from the federal government generated from general revenues.

DESCRIPTION OF ALIEN STATUS IN THE UNITED STATES

Congress, unlike the states, finds a constitutional source for the control of aliens through Article I, Section 8, Clause 4 of the United States Constitution. This grant of power explicitly vests in Congress the power to establish uniform rules of naturalization for the foreign-born. The United States Supreme Court has held that the power of the federal government to regulate immigration and deportation is an inherent aspect of national sovereignty.[3] Also, the Supreme Court has held that, included within the plenary power of Congress to control immigration, deportation and naturalization, is the power "to fix the conditions under which aliens are to be permitted to enter and remain in this country".[4]

Various limitations on the rights of aliens are found directly in the Constitution. For example, only U.S. citizens may become members of Congress.[5] Many federal statutes differentiate between U.S. citizens and aliens. Most of these statutes place limitations on the rights of aliens, while some exempt aliens from liabilities that attach to citizenship.[6] Certain

[3] *See Chinese Exclusion Case.* 130 US 581, 603–604.

[4] *Fleming v. Nestor.* 363 US 603, 616.

[5] *See, Article I, Section 2 and Section 3, Clause 3, U.S. Constitution.*

[6] *See, e.g.,* 19 U.S.C. 1586 (e), prohibition against unloading vessels within specified off-shore waters applicable only to citizens; 28 U.S.C. 1861 8865 (b) (1) service on federal court jury; 47 U.S.C. 303 (1) aliens generally ineligible for radio station licenses; 12 U.S.C. 1427 (a) director of home loan bank limited to U.S. citizens.

rights extend only to aliens "lawfully admitted for permanent residence".[7] Finally, certain statutes impose burdens or provide rights to persons regardless of their citizenship status.[8]

The U.S. Supreme Court described the unique status of aliens in the case of *Harisiades v. Shaughnessey*, 342 U.S. 580, 585:

> So long as one thus perpetrates a dual status as an American inhabitant but foreign citizen, he may derive advantages from two sources of law — American and international. He may claim protection against our Government not available to the citizen. As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf, a patronage often of considerable value...
>
> The alien retains immunities from burdens which the citizen must shoulder. By withholding his allegiance from the United States, he leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect. In deference to it, certain dispensations from conscription for any military service have been granted foreign nationals. They cannot, consistently with our international commitments, be compelled 'to take part in operations of war directed against their own country.' In addition to such general immunities they enjoy particular treat privileges.

Aliens have been held to be "persons" within the meaning of the Fifth Amendment [9] and the Fourteenth Amendment.[10] These constitutional amendments provide for due process of law and equal protection under the law. This, however, has not meant that aliens have been granted all of the rights and privileges of U.S. citizenship. As already pointed out, many federal statutes distinguish between aliens and citizens. As noted by the Supreme Court in the *Harisiades* case cited *supra:*

> Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen (342 U.S. at 586).

The U.S. Supreme Court has recently indicated that it will apply two distinct tests in evaluating the Constitutionality of laws concerning alienage. The first test, annunciated in the case of *Graham v. Richardson*, 403 U.S. 365 (1971), concerns what test will be applied to state statutes or regulations concerning aliens. The Supreme Court held that:

[7] *See*, 19 U.S.C. 8523 enlistment in Air Force in peacetime; 42 U.S.C. 428 (a) transitional eligibility provisions for retirement benefits.

[8] *See*, 42 U.S.C. 1983, protection of civil rights.

[9] *See, Wong, Wing v. United States*, 163 U.S. 228, 238.

[10] *See, Yick Wo v. Hopkins*, 118 U.S. 356, 369.

> aliens as a class are a prime example of a 'discrete and insular' minority for whom...heightened judicial solicitude is appropriate (403 U.S. at 372).

The thrust of this standard is that it required a state to possess a "compelling governmental interest" to justify an alien classification. This stringent test was watered down in the recent case of *Foley v. Connelie*, 98 S.Ct. 1967 (1978), in which an alien brought an action challenging a New York statute limiting appointment of members of the New York State Police Force to U.S. citizens. The Supreme Court declined to follow the strict scrutiny test developed in *Graham v. Richardson*, and instead concluded:

> ...our scrutiny will not be so demanding where we deal with matters firmly within a state's constitutional prerogatives.' ...The state need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification (98 S.Ct. at 1070).

The less exacting standard applied in the *Foley* case, was justified on the ground that the courts must "examine each position in question to determine whether it involves discretionary decisionmaking, or execution of policy..." If the former is involved, the Supreme Court has apparently suggested that state regulation of aliens will withstand challenge if the regulation is merely "rational".

However, in contrast to the tests applied to measure state restrictions on aliens, the Supreme Court has clearly allowed the federal government to control alienage as long as the federal statute or regulation is not "wholly irrational".[11] The *Diaz* case concerned a federal statutory provision controlling participation in the Medicare supplementary insurance program by providing that eligibility was limited to aliens lawfully admitted for permanent residence who had been residing in the United States for at least five years. The only rationale offered for the program was that "those who qualify under the test Congress had chosen may reasonably be presumed to have a greater affinity with the United States than those who do not".[12] The Supreme Court therefore signaled in *Diaz* that it would not require the federal government to meet a strict test in justifying lines drawn between the treatment of citizens and aliens.

In analyzing federal regulations concerning alienage, as opposed to federal statutes, another test must be kept in mind. It is clear that a federal regulation cannot be inconsistent with, or alter the scope of, a federal statute. Specifically, a federal agency cannot promulgate a rule or regulation that

[11] *Mathews v. Diaz*, 426 U.S. 67, 83 (1976).

[12] 426 U.S. at 83.

goes beyond its statutory mandate.[13] As will be discussed, certain regulations promulgated by HEW to limit alien participation in program benefits are not clearly supported by statutory authority.

DEFINITION OF TERMS

Aliens

Firstly, it is important to distinguish as accurately as possible between United States citizens and aliens. Basic rules concerning who is a U.S. citizen should be available to all persons involved in the question of alien eligibility for federal benefit programs. While in some cases it may be extremely difficult to evaluate who is a U.S. citizen, the following basic rules should resolve the matter in most cases.

1) All persons born in the United States are deemed to be United States citizens. Immigration and Nationality Act, Section 301, hereinafter "Immigration Act".[14] Whether or not the person left the United States at a young age is irrelevant.

2) A person born outside of the United States to parents, both of whom are United States citizens, and at least one of whom had a residence in the United States prior to the birth of such person, is a United States citizen.[15]

3) A person born outside of the United States to parents, one of whom is a United States citizen who has been physically present in the United States for a continuous period of at least one year prior to the birth of such person, and the other of whom is a national, not a citizen , of the United States, is a United States citizen.

4) A person born outside of the United States, to parents, one of whom is an alien, and the other a citizen of the United States, who, prior to the birth of such person, was physically present in the United States for a period or periods totaling not less than ten years, at least five of which were after the age of fourteen, is a United States citizen.[16] However, a person who thus qualifies for citizenship shall lose such citizenship unless: 1) he is physically present in the United States for at least two years between the ages of fourteen and twenty-eight; or 2) the alien parent is naturalized while the child is under the age of eighteen and the child begins to reside in the United States while under the age of eighteen years.[17]

5) Certain aliens are statutorily eligible for naturalization.[18] A naturalized alien gains United States citizenship; such status should be evidenced by possession of a Certificate of Naturalization.

[13] *See, Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), concerning the validity of a Civil Service Commission rule excluding aliens from federal civil service employment.

[14] 8 U.S.C. 1401 (a) (1). [15] 8 U.S.C. 1401 (a) (3). [16] 8 U.S.C. 1401 (a) (7).

[17] 8 U.S.C. 1401 (b). [18] 8 U.S.C. 1421 *et seq.*

Other than those classes mentioned above, the following statutory rights and changes should be noted.

1) Prior to 1934 the applicable law was Section 1993 of the Revised Statutes,[19] This law provided United States citizenship at birth to children born abroad "whose fathers" were United States citizens. In *Weedin v. Chin Bow*,[20] the Supreme Court ruled that in order to acquire citizenship under Section 1993, the child s father must have resided in the United States for any length of time prior to the birth of the child.

2) Section 1993 was amended by the Act of May 24, 1934, which remained effective through January 12, 1941.[21] The Act of May 24, 1934, granted to United States women citizens the same rights previously extended to American citizen fathers under Section 1993, of the Revised Statutes.

3) The Nationality Act of 1940, effective on January 12, 1941, controlled citizenship rights from January 12, 1941, through December 24, 1952. Section 504 of the Nationality Act specifically provided that the new act "shall not terminate nationality heretofore lawfully acquired".[22] The Act of 1940 provided citizenship to: 1) any person born outside the United States of parents both of whom were United States citizens and one of whom had resided in the United States prior to the birth of the child; and 2) any person born outside the United States to parents, one of whom was an alien and the other a citizen of the United States who had resided in the United States for a total of ten years, at least five of which were after attaining the age of sixteen years.[23]

The Nationality Act of 1940 was repealed by the Act of 1952,[24] (66 Stat. 279). However Section 405 (c) of that Act, 8 U.S.C. 1101, note, specifies that the repeal of any statute "shall not terminate nationality heretofore lawfully acquired". The most frequently utilized sections of the Act of 1952 have already been noted.[25]

Immigrants

Interestingly, the Immigration Act defines an immigrant as being "every

[19] Section 1, Act of February 10, 1855, 10 Stat. 604.

[20] 274 U.S. 675, 47 S. Ct. 772, 71 L.Ed. 1284 (1927).

[21] Section 1, Act of May 24, 1934, 48 Stat. 797.

[22] Nationality Act of 1940, 54 Stat. 1172.

[23] Sections 301 (c) and (201) (g), Nationality Act of 1940, 54 Stat. 1140 and 1139.

[24] 66 Stat. 279.

[25] In the event of a questionable or complex case, the authors recommend that the following text be consulted: *Immigration Law and Procedure*, Volume 3, by Charles Gordon and Harry N. Rosenfield. (Matthew Bender, 1975).

alien except an alien who is within one of the classes of "non-immigrants".[26] Therefore, for the purposes of federal law, all aliens, including those who may be unlawfully within the United States, are defined as being "immigrants" unless they have received "non-immigrant" status from INS.

In contrast, is the alien "lawfully admitted for permanent residence" who has been "lawfully accorded the privilege of residing permanently in the United States...in accordance with the immigration laws...".[27] To obtain lawful permanent residence status, an alien must first establish the existence of either close family ties in the United States or the ability to perform a job for which there are no domestic workers available.[28] Secondly, the alien must establish that he/she is not "excludable" from the United States under the terms of Section 212 of the Immigration Act.[29] These sections list qualitative factors which may prevent an alien from receiving "permanent residence" status.

Certain aliens who entered the United States prior to June 30, 1948, and: 1) who have maintained continuous residence in the United States since their entry; 2) who are persons of good moral character which generally means have suffered no criminal convictions; and 3) who are not ineligible to citizenship, may acquire permanent residence status from the Immigration Service.[30]

Finally, certain aliens admitted to the United States as refugees may acquire permanent residence status as a result of special legislation enacted by Congress. Various statutes have provided special authorization for granting permanent residence status to refugees who are in the United States in temporary or irregular status.[31]

The 1965 amendments to the Immigration Act made provision for the grant of "conditional entry" to certain refugees, which can be adjusted to permanent residence status after they have been residing in the United States for two years.[32] These refugee categories cannot be ignored given the vast numbers of persons admitted into the United States each year under one or another refugee program. For example, between 1946 and 1975 INS admitted into the United States approximately 1,064,858 refugees.[33]

[26] 8 U.S.C. Section 1101 (a) (15).
[27] 8 U.S.C. Section 1101 (a) (20).
[28] 8 U.S.C. Sections 1151–1153.
[29] 8 U.S.C. Section 1182 (a) (1)–(31).
[30] 8 U.S.C. Section 1259.
[31] *See*, Act of July 14, 1960, 74 Stat. 504, 8 U.S.C. Section 1182.
[32] 8 U.S.C. Sec. 1153 (a) (7), as amended by Act of October 3, 1965, P.L. 89–236, 79 Stat. 912.
[33] *See*, 1975 Annual Report: Immigration and Naturalization Service, p. 41.

Nonimmigrants

the Immigration Act lists twelve separate categories of nonimmigrant [8 U.S.C. Section 1101 (a) (15) (A)—(L)]. Generally, these include the following: 1) foreign public officials; 2) visitors; 3) aliens in transit through the United States; 4) crewmen; 5) aliens entitled to enter pursuant to a treaty of commerce or navigation; 6) students; 7) members of certain international organizations; 8) temporary workers; 9) members of foreign media; 10) aliens enrolled in certain academic exchange programs; 11) fiancee and fiance of a United States citizen; and, 12) inter-company transferees.

Non-immigrants entering the United States agree that they "will depart at the expiration of the period" of their admission or extension received from the Immigration Service.[34]

Policy decisions concerning the availability of federal benefits to non-immigrants lawfully admitted into the United States should be made with recognition of two factors: 1) many nonimmigrant aliens are entitled to remain in the United States for many years as a result of extensions of their visas issued by the INS; and, 2) nonimmigrant aliens abandon their status and claim one or another statutory basis upon which to permanently reside in the United States. For example, a former nonimmigrant may apply for permanent residence status under the terms of Section 245 of the Immigration Act.[35] The actual immigration status of such an alien may remain unclear until INS decides either to grant his/her application or to initiate deportation proceedings. The alien remains statutorily entitled to continue residing in the United States until a finding of deportability is entered. The alien is, therefore, in a hybrid state which he/she may often not be in a position to resolve. The Immigration Service may take an exceptionally long time to adjudicate an alien's application for permanent residence status. At the same time INS may, for any one of a number of reasons , determine not to initiate deportation proceedings against the alien.[36]

Deportable v. Nondeportable Aliens

Distinctions between "legal" and "illegal" aliens have no rational relationship with categories of aliens as created in the Immigration Act and regulations created by the INS. Nowhere in the Immigration Act is the term "illegal" alien mentioned. Instead, the lawfulness of an alien's presence in the United States is measured against the deportation statute and

[34] *See*, Code of Federal Regulations, Volume 8, Section 214.1 (a), herinafter "CFR".

[35] 8 U.S.C. Section 1255. [36] 8 U.S.C. Section 1252; 8 CFR Sections 242.5 and 242.7.

regulations.[37] In determining whether or not certain noncitizens should receive federal benefits, it logically may be suggested that such benefits should be available to all persons lawfully in the country and who have their domicile in the United States. Only those persons who are deportable, are not lawfully in the United States. The question of deportability goes beyond the "legality" of a person's entry into the United States.

Until the Immigration Service reaches a determination that a person is deportable, the person involved retains the right to remain residing in the United States.[38]

A finding of deportability by the Immigration Service can only take place after a hearing which involves many procedural rights due to the severity of the consequences of the proceedings.[39] The proceedings are adversary in nature, and an immigration judge acts as the arbiter of law and fact. Substantively, even if a person is found to be deportable, various defenses to deportation are available which may ensure a person's right to remain in the country.[40] For example, Section 241 (f) of the Immigration Act [8 U.S.C. Section 1251 (f)] provides that certain aliens are not deportable even though they entered the United States through fraudulent means. In the case of *Vitales v. Immigration and Naturalization Service*, 443 F.2d 343 (1971), an alien entered the United States with a non-immigrant visa and subsequently gave birth to a child in this country. The alien was charged as being deportable by INS on the ground of having overstayed the permitted time on the visa. The alien admitted to having made false statements in acquiring her visa but claimed to be otherwise admissible to the United States. The finding of deportability made by an immigration judge was reversed on the grounds that Section 241 (f) avoided deportation for certain persons who entered the United States fraudulently but who have certain defined relatives living in the United States.[41] Given the nature of the congressionally mandated and constitutionally required procedure to determine deportability, limitations on benefits that exclude persons who have not been determined to be deportable aliens may well make ineligible persons, in fact, lawfully entitled to reside in the United States. Recognizing this, the State of California has provided a partial solution by allowing for a presumptive period of eligibility for medical benefits pending

[37] 8 U.S.C. Section 1251.

[38] 8 U.S.C. Sections 1105a, 1242; 8 CFR Section 3.6; *Heikkila v. Barbes*, 345 U.S. 229 (1953); *Shaughnessy v. Pedreiro*, 349 U.S. (1955).

[39] 8 CFR Section 242.

[40] 8 U.S.C. Sections 1182 (c), 1182 (h), 1182 (i), 1251 (f), 1253 (h), 1254 and 1259.

[41] *See also, United States v. Osuna-Picos*, 443 F.2d 907 (1971); *Lee Fook Chueg v. Immigration and Naturalization Service*, 439 F.2d 244 (1971); and *Muslimi v. Immigration and Naturalization Service*, 408 F.2d.

communication with INS on the person's immigration status. However, in the State of California such presumptive eligibility does not last until INS determines that an alien is deportable. Instead, it lasts only until INS informs the state agency that INS records do not indicate that the alien falls into one of certain defined categories of aliens who qualify for benefits in the State of California.

Documentable versus Nondocumentable Aliens

Another approach to categorizing aliens may be to distinguish between those who are documentable and those who do not qualify for documentation. In this context, the word "documentable" means that the alien establishes *prima facie* eligibility for gaining permanent residence status on the basis of a relationship to a United States citizen parent, spouse or child,[42] or on the basis of a less direct relationship with a United States citizen or another permanent resident alien.[43]

Specifically, the following aliens can establish *prima facie* eligibility to immigrate into the United States as permanent resident aliens: 1) the children,[44] spouses and parents[45] of United States citizens; 2) the unmarried sons and daughters of a United States citizen, that is, children 21 years of age or older;[46] 3) the spouses, unmarried sons and unmarried daughters of aliens lawfully admitted for permanent residence;[47] 4) the married sons or married daughters of citizens of the United States;[48] 5) the brothers or sisters of citizens of the United States who are over 21 years of age.[49] Furthermore, the spouse or child of a person falling into one of the above categories, may accompany such person and is likewise entitled to receive permanent residence status.[50]

Aliens falling into the above categories are generally documentable. It is well known that the Immigration Service is far behind in processing the

[42] 8 U.S.C. Section 1151 (b).

[43] 8 U.S.C. Section 1153 (a).

[44] The term "child" is generally defined as an unmarried person under 21 a) a legitimate child; b) a stepchild, if the child has not reached the age of 18 years when the marriage creating the status of stepchild occurred; c) a child legitimated under the law of the child's residence or under the law of the father's residence, if legitimation took place before the child reaches the age of 18; d) an illegitimate child if the child's natural mother is a United States citizen; e) a child adopted while under the age of 14 if the child lived with the adopting parents for two years after such adoption. *See*, 8 U.S.C. Section 1101 (b) (1).

[45] To qualify as the "parent" of a United States citizen, the child must be at least 21 years of age. 8 U.S.C. Section 1151 (b).

[46] 8 U.S.C. Section 1153 (a) (1).

[47] 8 U.S.C. Section 1153 (a) (2).

[48] 8 U.S.C. Section 1153 (a) (4).

[49] 8 U.S.C. Section 1153 (a) (5).

[50] 8 U.S.C. Section 1153 (a) (9).

applications of documentable aliens. Such aliens, for the most part, remain without INS documents pending processing of their applications. Most of these aliens have not undergone deportation proceedings and, therefore, their deportability remains questionable. A policy decision on what aliens should qualify for federal benefits should include consideration of whether to make eligible for benefits, aliens residing in the United States who are awaiting processing of submitted applications.

Miscellaneous Categories of Aliens

The Immigration Service may place an alien into one of several categories which prevent physical removal from the country. Such aliens may never have appeared in deportation proceedings, or they may have been found deportable and subsequently have been granted some form of relief. Some examples follow:

1) Prior to a deportation hearing, INS may place a person in a "voluntary departure" status and may grant the person an indefinite time within which to voluntarily depart the United States.[51] Such status may be granted for humanitarian reasons.

2) INS may initiate deportation proceedings against an alien and later cancel the proceedings if satisfied that the person "is actually a national of the United States, or is not deportable under the immigration laws...".[52] Therefore, certain aliens may remain in a hybrid status due to an INS decision to terminate a deportation hearing without conclusively determining the deportability of the alien.

3) 8 CFR Section 108 allows certain aliens to make application for political asylum in the United States. This category of aliens exists independently of those obtaining refugee status under 8 U.S.C. Section 1153 (a) (7) and of those obtaining parole status under 8 U.S.C. Section 1182 (d) (5). It is under this latter section that many hundreds of thousands of Cubans and South Vietnamese have been recently admitted into the United States.

4) Under Internal Operations Instructions of INS, which have the force of law, it is provided that certain aliens, who file applications to adjust their status to that of a permanent resident under 8 U.S.C. Section 1255, shall not have deportation proceedings initiated against them while the application for adjustment is pending.[53]

[51] 8 CFR Section 242.5.

[52] 8 CFR Section 242.7.

[53] *See*, Operations Instructions, Section 242.1 (a) (25).

5) Under INS Operations Instructions, certain aliens who have made application for permanent residence status are entitled to remain in the United States until such time as their applications have been processed and the American consul is "ready to issue an immigrant visa...".[54] Such aliens may also receive from INS a document indicating that they are authorized to accept employment in the United States.

6) Under the INS Operations Instructions Section 243.3, it is provided that a district director of INS "may grant a stay of deportation for such period of time as he deems necessary. A stay of deportation under this paragraph may be granted by a district director upon his own initiative without application being made by the alien." Such a stay shall be granted when there are "compelling humanitarian factors" found to exist by the district director.

ANALYTICAL HISTORY OF FEDERAL STATUTES AND REGULATIONS CONCERNING ALIEN ELIGIBILITY UNDER TITLES IV, XVI AND XIX OF SOCIAL SECURITY ACT

While it may be possible to analyze each title separately as to its developing history of citizenship requirements, the generally simultaneous and identical treatment of each title by HEW simplifies a combined analysis.

Prior to the 1972 amendments to the Social Security Act,[55] Congress had not directly addressed the question of alienage in regard to the availability of benefits under titles IV—A, XVI and XIX of the Social Security Act. Indeed, statutory alienage provisions are still largely absent from current legislation establishing eligibility under the Aid for Families (Title IV—A) programs and Medicaid (Title XIX). Congress seemingly has been content to allow HEW to control the substance of citizenship requirements for program participations. This approach has had the positive effect of depositing with HEW officials the flexibility needed to adjust eligibility criteria to changing Department of Justice policies and regulations on immigration, deportation and naturalization. It has had the negative effect of circumventing the legislative process, leaving HEW officials with the power to adjust eligibility criteria as they see fit.

In 1971 no federal regulation controlled alien eligibility for benefits under Title IV—A. In contrast 20 CFR Section 233.50, created the following standards for state plan approval:

[54] *See*. Operations Instructions, Section 242.10.

[55] Public Law 92—603, Section 1614, 86 Stat. 1465, approved October 30, 1972, effective January 1, 1974.

(a) A State plan under Title I, X, XIV, XVI of the Social Security Act may not exclude an otherwise eligible citizen of the United States, regardless of how (by birth or by naturalization), or when, citizenship was obtained.

(b) A State plan may include all persons without regard to citizenship status. Where there is an eligibility requirement applicable to noncitizens, a state plan may, as an alternative to excluding all noncitizens, otherwise eligible, who have resided in the United States for a specified number of years.[56]

This regulation controlled the question of alien eligibility under Title XVI, programs for the aged, blind and disabled. With regard to Title XVI, statutory authority for the above regulations was placed on 42 U.S.C. Section 1352 (b), which provides in relevant part.

The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes, as a condition of eligibility for aid to the permanently and totally disabled under the plan —

Any citizenship requirement which excludes any citizen of the U.S.

Also pursuant to this statute, the following Handbook section was adopted:

3720. Requirements for State Plans

A State plan under Titles I, X XIV, and XVI may not impose, as a condition of eligibility, any citizenship requirement which excludes any citizen of the United States.

3730. Interpretation of Requirement

State plans need not contain a citizenship requirement. The purpose of IV—3720 is to ensure that where such a requirement is imposed, an otherwise eligible citizen of the United States, regardless of how (by birth or naturalization) or when citizenship was obtained, shall not be disqualified from receiving aid or assistance under Titles I, X, XIV, and XVI.

Where there is an eligibility requirement applicable to noncitizens, State plans may, as an alternative to excluding all noncitizens, otherwise eligible, who have resided in the United States for a specific number of years.[57]

The HEW regulations in 1971 obviously left much discretion in the hands of State governments to limit alien eligibility for program benefits. This flexibility was later struck down in *Graham v. Richardson*.

[56] *See*, 36 F.R. 3867, 45 CFR Section 233.50, February 27, 1971.

[57] HEW Handbook of Public Assistance Administration, pt. IV.

With regard to benefits under Title XIX, the following regulation, almost identical to 45 CFR Section 233.50, controlled eligibility for the medically needy:

> Section 248.50 Citizenship.
>
> Conditions for plan approval:
>
> (a) A State plan under Title XIX of the Social Security Act may not exclude an otherwise eligible citizen of the United States, regardless of how (by birth or by naturalization), or when, citizenship was obtained.
>
> (b) A State plan which includes the medically needy must include all otherwise eligible individuals, regardless of citizenship status, unless all of the State's approved financial assistance plans require citizenship as a condition of eligibility.
>
> (c) A State plan may include persons without regard to citizenship **status, even though all of the state's financial assistance plans contain such a requirement.**[58]

The apparent statutory authority for this regulation was Section 1902 (b) of Title XIX, 42 U.S.C. Section 1396a (b), which required that the Secretary of HEW should not approve a State plan which imposed as a condition of eligibility:

> (3) any residence requirement which excludes any individual who resides in the State; or
>
> (4) any citizenship requirement which excludes any citizen of the United States.

While the meaning of 42 U.S.C. Sections 1352 (b) and 1396a (b) is not entirely clear, these sections, at least upon literal reading, do not authorize States to adopt durational residency requirements or other eligibility restrictions applicable only to aliens.[59] The legislative history of 42 U.S.C. Section 1352 (b) provides little insight into the Congressional intent in enacting this statute.[60]

Brief Analysis of Grahan v. Richardson

The issue involved in the *Graham v. Richardson* case was whether the Equal Protection Clause of the Fourteenth Amendment prevents a state from conditioning welfare benefits either: 1) upon the beneficiary's possession of

[58] 36 H.R. 3872, Feb. 27, 1971, 45 CFR Section 248.50.

[59] *See, Graham v. Richardson* 403 U.S. at 381.

[60] *See*, H.R. Rep. No. 1300, 81st Congress, 1st Section, 53, 153–154; S. Rep. No. 1669, 81st Congress, 2nd Session; H.R. Conf. Rep. No. 2771, 81st Congress, 2nd Session, 118–119.

United States citizenship; or 2) if the beneficiary is an alien, upon his having resided in this country for a specified number of years.

The Supreme Court consolidated two cases in *Graham*. The first case concerned the state's participation in federal categorical assistance programs. These programs originated with the Social Security Act of 1935, 49 Stat. 620, as amended, 42 U.S.C., c.7. They were supported in part by federal grants-in-aid and were administered by the States under federal guidelines. Arizona Rev. Stat. Ann. Tit. 46, Art.2, as amended, provided for assistance to persons permanently and totally disabled (APTD).[61] Arizona Rev. Stat. Ann. Section 46—233 (Supp. 1970—1971), as amended in 1962, read:

> A. No person shall be entitled to general assistance who does not meet and maintain the following requirements:
>
> 1. Is a citizen of the United States, or has resided in the United States a total of fifteen years.

A like eligibility provision conditioned upon citizenship or durational residence appeared in Section 46—252 (a), providing old age assistance, and in Section 46 — 272 (4), providing assistance to the needly blind.[62] Carmen Richardson was a lawfully admitted alien who immigrated to the United States in 1956 and from that time continuously resided in Arizona. She later became totally disabled but failed to qualify for benefits solely because she did not meet Arizona's 15 year residency requirement for aliens.

The second case, from Pennsylvania, concerned that portion of a general assistance program that was not federally supported. The relevant statute was Section 432 (2) of the Pennsylvania Welfare Code, Pa.Sta.Ann., Tit. 62, Section 432 (a) (1968), orginally enacted in 1939. It provided that those eligible for assistance should be: 1) needy persons who qualify under the federally supported categorical assistance programs; and, 2) those other needy persons who were citizens of the United States. Assistance to the latter group was funded wholly by the Commonwealth. The alien in this case was also lawfully admitted for permanent residence, having arrived in the United States in 1965. In 1969 illness forced her to abandon her employment and seek public assistance. Because she was not a United States citizen, she was deemed ineligible for benefits.

The Supreme Court, noting that the Fourteenth Amendment's due process and equal protection clauses applied to "lawfully admitted resident aliens as well as citizens of the United States",[63] went on to conclude that classification involving alienage were "inherently suspect" and, therefore, "subject to strict judicial scrutiny...".[64] The Court proceeded to strike down the state classi-

[61] *See*, 42 U.S.C. Sections 1351—1355.

[62] *See*, 42 U.S.C. Sections 1201—1206, 1381—1385.

[63] 403 U.S. at 371.

[64] 403 U.S. at 376.

fications because: 1) the States' fiscal purposes in excluding aliens were not compelling; 2) the State statutes "encroached" upon exclusive federal power",[65] over aliens; and, 3) federal law[66] "did not authorize" the State statutes involved.[67] The *Graham* ruling, although somewhat shaken by the *Foley* decision described previously, shattered the ability of State governments to arbitrarily exclude lawfully admitted permanent resident aliens from participation in need related assistance programs. Numerous changes in federal regulations concerning citizenship requirements in aid programs followed the *Graham* decision.

Federal Regulations Between the Graham Decision and the Enactment of Public Law 92—603

In response to the ruling in *Graham v. Richardson,* the Secretary of HEW published proposed regulations concerning alien eligibility under *inter alia,* Titles IV — A, XVI and XIX of the Social Security Act. It should be kept in mind that Congress had yet to specifically deal with this question. In the preamble to the proposed amendments, the Secretary states that the "amendments specify that, as a condition of approval, a state plan may not exclude an otherwise eligible individual solely on the basis that he is not a citizen or because of his alien status".[68]

The proposed regulations read as follows:

1) Section 233.50 is revised to read as follows:

Section 233.50 Citizenship and alienage.

Condition for plan approval: A State plan under Title I, IV—A, X, XIV, or XVI of the Social Security Act may not exclude an otherwise eligible individual on the basis that he is not a citizen, or because of his alien status.

2) Section 248.50 is revised to read as follows:

Section 248.50 Citizenship and alienage.

Condition for plan approval: A State plan under Title XIX of the Social Security Act may not exclude an otherwise eligible individual on the basis that he is not a citizen or because of his alien status.

Final regulations were not adopted before Congress finally addressed the issue of alien eligibility for program participation. However, Congress only concerned itself with alien eligibility under Title XVI (S.S.I.). It is here that the now familiar "under color of law" concept originated.

[65] 403 U.S. at 380. [66] Ramely, 42 U.S.C. Section 1352 (b). [67] 403 U.S. at 383.
[68] Federal Register, Vol. 37, No. 117, June 16, 1972.

The term "under color of law" first appears in Public Law 92—603, 86 Stat. 1465, the Social Security Amendments of 1972. Denominated H.R.1, during the second session of the 92nd Congress, the bill was reported out of the House Ways and Means Committee on May 26, 1971, as House Report 92—231. The committee report provided the following language on alienage:

> An eligible individual must be a resident of the United States, Puerto Rico, the Virgin Islands, or Guam, be a citizen or an alien admitted for permanent residence, and be aged, blind, or disabled.[69]

The bill was passed by the House containing the following language:

> MEANING OF TERMS
>
> Aged, Blind, or Disabled Individual
>
> Section 2014 (a) (1) For purpose of this title, the term 'aged, blind, or disabled individual' means an individual who — A) is 65 years of age or older is blind [as determined under paragraph (2)], or is disabled [as determined under paragraph (3)], and B) is a resident of the United States, and is either (I) a citizen or (II) an alien lawfully admitted for permanent residence.[70]

The Social Security Amendments were reported out of the Senate Finance Committee, Senate Report 92—1230, on September 26, 1972. The Senate Report made the following statement on the question of the eligibility of aliens for S.S.I. benefits:

> Benefits under the new program would be paid only to people who are residents of the 50 States and the District of Columbia, and who are either United States citizens or aliens lawfully admitted for permanent residence. The present provisions of Titles I, X, XIV, and XVI of the Social Security Act would continue in effect for Puerto Rico, the Virgin Islands, and Guam.

As brought to the floor of the Senate, the bill read as follows:

> MEANING OF TERMS
>
> Aged, Blind, or Disabled Individual
>
> Section 1614 (a) (1) For purposes of this title, the term aged, blind or disabled individual, means an individual who — A) is 65 years of age or older, is blind [as determined under paragraph (2)], or is disabled [as determined under paragraph (3)]; and, (B) is a resident of the United States and is either (1) a citizen or (11) an alien lawfully admitted for permanent residence.[71]

[69] House Report 92 — 231, at page 26.

[70] Congressional Record, June 22, 1971 at 21412.

[71] Congressional Record, September 29, 1972, at 32879.

Congressional Record, September 29, 1972 at 32899.

The term, "under color of law", had not yet appeared in the proposed legislation. It was on the floor of the Senate that Senator Chiles offered two amendments on behalf of himself and Senator Gurney from Florida. Senator Chiles wanted to "simply make clear in the bill that it would not detract from" the eligibility of at least 12,000 Cuban refugees who were then residing in Florida. As Senator Gurney stated the primary purpose of the amendments was to ensure that the federal government carried the cost "to prevent a great and unintended economic hardship being placed upon the people of Dade County, Florida". The refugees residing in Florida were viewed by Senator Gurney as a federal responsibility and he, therefore, urged that his proposed amendments be adopted, providing as follows:

> On page 531, line 6, insert immediately before the period the following: 'or otherwise permanently residing in the United States under color of law'.
>
> At the end of Part A, Title 5, of the bill, add the following new section:
>
> "Section — Meaning of 'permanently residing in the United States under color of law' for the purposes of this act and any provision of the Social Security Act amended by this Act, the term 'alien permanently residing in the United States under color of law' shall include an alien refugee who is lawfully present in the United States as a result of the application of the provisions of Section 203 (a) (7) or Section 212 (d) (5) of the Immigration and Nationality Act'.

So appeared the concept of "under color of law" in the Social Security Act. The amendments were agreed to. However, the subsequent House Conference Report makes no mention of those particular Senate amendments. A House Concurrent Resolution, H. Cong. Res. 724, was later introduced to correct the enrollment of H.R.1. As regards the Chiles-Gurney amendments, the following correction to H.R. 1 was made:

> 4) In Section 301 of the bill, in the proposed new Section 1614 (n) (1), before the following '[including any alien who is lawfully present in the United States as a result of the application of the provisions of Section 203 (a) (7) of Section 212 (d) (5) of the Immigration and Nationality Act].

The amendments are codified in 42 U.S.C. Section 1382c (a) (1) (B). In choosing the particular standard that it did, Congress clearly contemplated that certain aliens, in addition to that category known as permanent resident aliens, would qualify for federal Social Security Act benefits. Congress, however, has never seen fit to amend the statutory language contained in Titles IV—A or XIX.

It should be noted that the term "under color of law" is nowhere to be

found in the Immigration and Nationality Act, 8 U.S.C. Sections 1101, *et seq*. While this lack of homogeneity between Congress' definitional efforts in the Social Security Act and in the Immigration Act has in the past required, and will in the future require, creative statutory construction efforts, the term "under color of law" nevertheless possesses a flexibility which allows eligibility for program participation to adjust itself in changing Justice Department policies, rules and regulations on immigration matters. Such changes, of course, may result from Congressional action, Justice Department or HEW initiated amendments in regulations or rules, or judicial intervention in immigration matters.

General Meaning of the Term "Under Color of Law"

The Permanent Edition of *Words and Phrases*, West Publishing Company, page 285, provides some insight into the historical use of the term "under color of law". "Color" as a modifier, in legal parlance, generally means "appearance as distinguished from reality". "Color of Law" has been interpreted. to mean the mere semblance of legal right, as opposed to an actual legal right.[72] Perhaps most frequently encountered in relation to the Civil Rights Act, "color of law" means pretense of law and includes the acts of officers who undertake to perform their official duties. Misuse of power, possessed by virtue of state laws and made possible only because the wrongdoer is clothed with the authority of state law, is deemed to be action taken "under color of "State law within the Civil Rights Act.[73] Similarly, "under color of title" in real property matters refers to the appearance of title. And "under color of office" is defined as a pretense of official right to do an act made by one who has no such right, and is distinguished from "by virtue of office" implying lawful power.[74]

It should be clear that the historical usage of the term "under color of law" provides little guidance in understanding the term as used to define alien eligibility for federal program benefits. At least one court has had an opportunity to analyze this concept and that decision is discussed in a subsequent section. Prior to looking at that decision, the response of HEW to 42 U.S.C. Section 1382c (a) (1) (B) should be understood.

Federal Regulations After Enactment of Public Law 92—603

Following the publication of proposed amendments to 45 CFR Sections 233.50 and 248.50 on June 16, 1972, discussed previously, no final amendments

[72] *McCain v. City of Des Moines*, 171 U.S. 168, 17 S.Ct. 644.

[73] *See, United States v. Claisc, La.*, 313 U.S. 299, 61 S.Ct. 1031, 1043.

[74] *See, e.g., Malone v. Howell*, 192 So. 224, 227, 140 Fla. 673

were promulgated. Instead, further proposed regulations appeared in the Federal Register on June 27, 1973, "[a]fter consideration of the views presented (in response to the June 16, 1972 proposals), and of the thrust of recent legislation..."[75]

The 1973 Notice of Proposed Rulemaking noted that comments to the June 16, 1972 notice had been received from 39 persons, 50 percent of whom were opposed to the granting of assistance to aliens "who have not been lawfully admitted to this country". The objections came from 17 states, and may be summarized as follows:

1) many comments apparently took the position that *Graham v. Richardson* and the "equal protection" clause of the Fourteenth Amendment are not applicable to aliens not lawfully admitted to the United States; 2) many comments were apparently received reflecting a concern that the proposed policy "would raise caseloads beyond the State's fiscal capability" or require a corresponding reduction in assistance to United States citizens and lawfully admitted aliens; and 3) many comments reflected the belief that assistance to aliens "should be fully financed from Federal funds" because immigration was viewed as an exclusive Federal function. The Notice of Proposed Rulemaking went on to note that:

> After consideration of the views presented and of the thrust of recent legislation [42 U.S.C. Section 1382c (a) (1) (B)], we are changing the proposal to require that a state plan must include any otherwise eligible resident of the United States who is either a citizen or an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law...

Thus appeared in Titles IV—A and XIX, as well as in Title XVI, regulations which were directly authorized by 42 U.S.C. Section 1382c (a) (1) (B); the limitation on alien eligibility which required that a state plan must include aliens admitted for lawful residence and those "permanently residing in the United States under color of law...". The following proposed regulations were outlined in the Federal Register:

> Section 233.50 Citizenship and Alienage.
>
> Conditions for plan approval. A State plan under Title I, IV—A, X, XIV, or XVI of the Social Security Act shall include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of Section 203 (a) (7) or Section 212 (d) (5) of the Immigration and Nationality Act.

[75] Namely, 42 U.S.C. Section 1382c (a) (1) (B).

Section 248.50 Citizenship and Alienage.

Conditions for plan approval. A State plan under Title XIX of the Social Security Act shall include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law [including any alien who is lawfully present in the United States as a result of the application of the provisions of Section 203 (a) (7) or Section 212 (d) (5) of the Immigration and Nationality Act.]

The final regulation appeared in the Federal Register on November 2, 1973, in Volume 38, No. 211. Incredibly enough, HEW had received only nine letters commenting on the proposed regulations. These came from members of Congress, State welfare agencies, Legal Aid groups and other organizations. The comments received concerned the following: 1) one state suggested that it would be spending unnecessary administrative time determining the status of applicants and recipients.[76] This state suggested that the limitations be optional so that states with problems could include the limitations while other states could avoid the administrative costs associated with screening applicants and recipients on the basis of their immigration status; 2) a number of the comments pointed out that the alien is frequently not able to present documentation proving his/her immigration status. It was also argued that the complexity of the procedures, and delays attendant therewith, would cause undue hardship on needy applicants and recipients. Two legal aid groups suggested adopting California's approach to alien eligibility for medical assistance. The comment stated that "nothing in this regulation would preclude a state from adopting as an administrative procedure, the California method of certification followed by verification with Federal immigration authorities to determine alien status". The "California method" is briefly discussed in the following pages; and 3) two

[76] Similarly, in a research study entitled "*A Study of Impact of Illegal Aliens on the County of San Diego on Specific Socioeconomic Areas*", conducted by the Human Resources Agency at the request of the San Diego County Board of Supervisors, it was found that of 5,891 alien applicants studied between March 12, 1975, and July 31, 1975, "only ten illegal aliens were found to be on the welfare rolls". In a letter from Homer E. Detrich, Director, County of San Diego, Department of Public Welfare to Marion Woods, Director, State Department of Benefit Payments, dated August 12, 1975, Mr. Detrich, commenting on a new procedure established by regulatory amendments in California for detecting "illegal" aliens, stated that the new procedure "hardly justifies the expenditure". *See*, San Diego study, at page 40. In his letter Mr. Detrich requested that San Diego be allowed to discontinue the new California procedure for detecting "illegal aliens". The San Diego study concluded that the administrative cost of processing forms designed to detect "illegal" aliens was *greater* than the direct aid granted to the ten "illegal" aliens who were found to be receiving assistance. *Id.*, at page 42. Similar studies conducted by welfare agencies are discussed in the following pages.

immigration related groups recommended adoption of the previous proposal, published on June 16, 1972. That proposed regulation apparently contemplated that a state plan could not exclude an otherwise eligible individual cause of his/her alien status.

After receiving the above general comments submitted to HEW in response to the June 27, 1973, notice of proposed rulemaking, it was noted that:

> Requiring inclusion of illegal aliens, or leaving the matter to state option would be inconsistent with Title III of Pub.L. 92—603, which establishes a Federal program of Supplemental Security Income for the Aged, Blind, and Disabled (S.S.I.) that excludes aliens not lawfully residing in this country. Accordingly, the regulations as proposed on June 27, 1973, are hereby adopted, (Federal Register, Vol. 38, No. 211, November 2, 1973).[77]

45 CFR Sections 233.50 and 248.50 were revised to finally read as follows:

Section 233.50 Citizenship and Alienage.

Conditions for plan approval. A State plan under Title I, IV—A, X, XIV, or XVI[78] of the Social Security Act shall include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law [including any alien who is lawfully present in the United States as a result of the application of the provisions of Section 203 (a) (7) or Section 212 (d) (5) of the Immigration and Nationality Act].

Section 248.50 Citizenship and Alienage.

Conditions for plan approval. A State plan under Title XIX[79] of the Social Security Act shall include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law [including any alien who is lawfully present in the United States as a result of the application of the provisions of Section 203 (a) (7) or Section 212 (d) (5) of the Immigration and Nationality Act].

[77] Federal Register, Vol. 38, No. 211, November 2, 1973.

[78] Note that for Title XVI this same citizenship/alien requirement appears in 20 CFR Section 416.202.

[79] Note that for Title XIX this same citizenship/alien requirement appears in 42 CFR Section 448.50.

Judicial Interpretation of "Under Color of Law"

The only Federal Court of Appeals decision, to my knowledge, involving the term "under color of law", as used to determine alien eligibility under the Social Security Act was decided by the Second Circuit on April 27, 1977. The case name is *Holley v. Lavine*, Docket No. 76—7588. The plaintiff in the case was an alien permanently residing in the United States with the knowledge of the Immigration Service. The Immigration Service provided her with an official communication which stated, in part, that INS "does not contemplate enforcing her departure" from the United States. Mrs. Holley had not been determined to be a deportable alien. She had entered the United States lawfully in 1954, but had overstayed her original entry. She had six children who were United States citizens, and presumably she was documentable.

Mrs. Holley was terminated from A.F.D.C. benefits after the State of New York in 1974 enacted Section 131—k—1 of its Social Services Law, which provided that every alien "unlawfully residing in the United States...is not eligible for aid to dependent children". The question presented to the Court of Appeal was whether the application of the New York State Law was repugnant to the provisions of 45 CFR Section 233.50, which as we have seen, allows aliens to qualify for benefits if they are permanently residing in the United States "under color of law". The State of New York argued that, to protect their solvency (we) have the right to drop from the welfare rolls those who, because their residence is in violation of law, are subject to deportation. However, the Court noted that INS was aware of Mrs. Holley's presence in the United States and yet deportation proceedings had not been instituted. The Court had to decide whether Mrs. Holley was "permanently residing in the United States under color of law". The Court first attempted to define the term "under color of law". It stated:

> There is no more common instance of action 'under color of law' than the determination of an official charged with enforcement of the law that he, as a matter of public policy, will exercise his discretion not to enforce the letter of a statute or regulation because such enforcement would involve consequences, or inflict suffering, beyond what the authors of the law contemplated. The discretionary refusal of a prosecutor or like administrator of the law to use his enforcement powers is often not supported by specific language in a statute or other charter of authority. Yet there is a legion of adjudicated cases which recognize that the prosecutor or like enforcing official may exercise a discretionary power, virtually unreviewable by a court, *not* to enforce a statutory command, and *not* to seek the imposition of penalties or other sanctions upon a known violator.... The case at bar is an obvious

> instance of an executive department, here INS, determining not to enforce one set of laws because to do so would defeat another avowed Congressional object, here that involved in enacting 42 U.S.C. Section 606 (b) (1). According to House Report No. 1300...the statute provides AFDC payments to the parent or other adult with whom a dependent child lives, on the ground that 'in families with small children, it is necessary for the mother or the adult to be in the home full time to provide proper care and supervision.

The Court found that Mrs. Holley was residing in the United States, "under color of law" because "those charged with the power to deport have allowed the plaintiff, as a parent of American citizens, to remain a resident".

The State of New York argued that even if Mrs. Holley was residing in the United States "under color of law", she was not "permanently residing" in the United States inasmuch as her status was dependent upon a letter which explicitly stated that INS did not contemplate enforcing her departure "at this time". In deciding this issue, the Court turned to 8 U.S.C. Section 1101 (a) (31), which provides that in immigration law "the term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law". Thus, Mrs. Holley would appear to have been residing in the United States permanently under the immigration law definition of that term. The Court further pointed out that the two examples of persons living in the United States "under color of law" in 45 CFR Section 233.50, namely refugees and parolees, are both allowed to remain in the United States only with the favorable exercise of discretion by the Attorney General. The Court recognized that these aliens, parolees and refugees are "permitted to stay in the United States...only so long as he (the alien) is in a particular condition". It was, therefore, concluded that Mrs. Holley's position was similar to that of a parolee or refugee, both of these latter categories being specifically included in 45 C.F.R. Section 233.50 as being in the United States "under color of law".

The essence of the decision in *Holley v. Lavine* appears to be that of an alien who has had contact with INS and against whom INS has determined not to institute deportation proceedings, may qualify as being permanently residing in the United States "under color of law". As previously pointed out regarding deportable versus nondeportable aliens, such persons like Mrs. Holley, are immune from physical removal from the United States until found to be deportable by the Immigration Service. I believe it may be concluded that where INS is aware of a person's presence, and for one reason or another determines that deportation proceedings are inappropriate, the alien may qualify as being present in the country "under color of law".

The "California Method" for Determining Alien Eligibility for Program Benefits

As noted above, the preamble to the final HEW regulations which appeared in the Federal Register on November 2, 1973, provided that nothing would "preclude a state from adopting as an administrative procedure, the California method of certification followed by verification with Federal immigration authorities to determine alien status". A brief examination of the "California method" is therefore provided.

California's approach to alien eligibility for program participation is contained in California Welfare and Institutions Code Section 11104, adopted as part of California's Welfare Reform Act of 1971. This section reads as follows:

> Any alien who is otherwise qualified for aid shall be eligible to receive public assistance if he certifies under penalty of perjury that to the best of his knowledge he is in the country legally *and* is entitled to remain indefinitely, *or* if he certifies that he is not under order for deportation, *or* if he certifies that he is married to an individual not under order for deportation.
> (Emphasis added).

The California procedure seemingly allows aliens to qualify for benefits until such time as INS determined that they were deportable. Part of the verification procedure involved sending the applicant's/recipient's name and address to INS for verification of the certification made. INS was then free to initiate deportation proceedings against the applicant/recipient if it believed the person to be deportable. This approach, of allowing aliens to qualify who are not under order for deportation, specifically allowed documentable aliens to establish eligibility. Aliens with applications pending to establish lawful permament residence are rarely placed under order for deportation by INS.[80]

Such aliens could establish eligibility under the California procedure. The author of the California legislation, explained why the procedure was adopted:

> In the Los Angeles area, a good deal of publicity was given to the possibility of illegal aliens receiving welfare. Testimony before the Senate Health and Welfare Committee revealed that the problem was not so much one of keeping illegal aliens off the rolls — *they rarely seek aid for fear of being discovered* — but rather of allowing legal aliens to secure welfare if they are otherwise qualified. Beilenson and Agran.

[80] *See, e.g.*, INS Operations Instruction Section 242.10, attached hereto as Appendix I.

"The Welfare Reform Act of 1971", Pac. L. Rev., 487 (1972) (emphasis added).

The California method for determining alien eligibility for benefits was given specific approval by HEW in the preamble to the final federal regulations published in the Federal Register on November 2, 1973. Subsequent to that date, the California welfare agency amended its interpretation of Section 11104 to require that all applicants/recipients certify that they are "in the country legally". Therefore, it was no longer possible for an alien to certify that he was simply "not under order for deportation". Instead, it became necessary to certify that one was "in the country legally and not under order for deportation". Furthermore, the new administrative practice required termination of benefits if INS responded to the welfare agency, upon reviewing the verification request, that no INS file could be located on the individual. These administrative amendments were challenged in the case of *Varela v. Swoap*, Case No. 251426, Superior Court of California, County of Sacramento. The court found that neither amendment was authorized by Section 11104 and, on February 4, 1975, enjoined their further enforcement.

It is interesting to note that in originally issuing the preliminary injunction in the *Varela* case, the judge found:

> (u)nder Federal law, it is not only aliens lawfully *admitted* to this country who may be entitled to aid — there also may be included those aliens permanently residing in this country under color of law (45 CFR Section 233.50), and this provides a reason for the legislative enactment of the second and third categories (in Section 11104).

However, on September 5, 1975, the California welfare agency, without the State legislature having amended Section 11104, again amended its regulations and restricted program benefits to only four discreet categories of aliens that were defined as being in the United States "under color of law". These were: 1) refugees; 2) parolees; 3) aliens granted indefinite voluntary departure by INS; and, 4) aliens granted an indefinite stay of deportation by INS. All aliens who certified under penalty of perjury that they were "not under order for deportation" were provided benefits for a presumptive period. During this period the State agency contacted INS and attempted to determine what status the alien held. If INS reported that the alien did not fall into one of the above described four categories, benefits were then to be terminated. This remains the system utilized by the State of California today. The case of *Varela v. Swoap* remains pending at this time before the Superior Court in Sacramento, California.

The Social Security Card Twist in Title IV—A

Title IV—A, as amended on January 4, 1975, by Public Law 93—647, provides that "each applicant for or recipient of aid shall furnish to the State

agency his social security number" and that such state agency shall utilize the account numbers in administration of the State plan.[81] This requirement is related to the many other requirements within Title IV – A concerning the need for certain individuals participating in the program to register for manpower services, training and employment. The Secretary of HEW has promulgated a regulation implementing this statute which states in part:

> The State plan must provide that: (a) As a condition of eligibility, each applicant for or recipient of aid will be required: 1) to furnish to the state or local agency a social security account number ("SSN")... 2) **If he cannot furnish an SSN...to apply for such number through procedures adopted by the state or local agency with the Social Security Administration...(b) The state or local agency will not deny, delay, or discontinue assistance pending the issuance or verification of such** numbers if the applicant or recipient has complied with the requirements of paragraph (a) of this section.[82]

The assignment of social security numbers is controlled by 20 CFR Section 422.104 – 109. Only the following persons may be assigned social security numbers:

(a) U.S. citizens, upon request;

(b) **aliens lawfully admitted to the United States for permanent residence or under authority of law permitting them to engage in employment in the United States...; and,**

(c) aliens who are legally in the United States but not under authority of law permitting them to engage in employment, but only for nonwork purposes.[83]

It may be assumed that the term "under authority of law" is analagous to the Social Security Act language of "under color of law". In both cases the bottom line appears to be that the person is in the United States with the knowledge of INS and against whom no deportation efforts are being undertaken. However, a tremendous amount of power is deposited in the INS hands considering the documentary requirements instituted to obtain a social security number.

The regulation allows for only two types of documentation in order to establish that the alien is entitled to employment in the United States. These are an Alien Registration Receipt Card, which establishes that the holder is a permanent resident alien; or, an "Arrival-Departure Record which contains an authorization to work" issued by INS.[84] This "Arrival-Departure Record" is an INS from 1 – 94 which is used in any number of situations when INS

[81] 42 U.S.C. Section 602 (a) (25) (A) and (B).

[82] 45 CFR Section 232.10.

[83] 20 CFR Section 422.104.

[84] 20 CFR Section 422.107 (d) (1) and (2).

wishes to provide a person with a temporary document establishing: 1) that INS is aware of the person's presence in this country; 2) a date, if any, on which INS is requesting that the person depart the United States; and, 3) whether or not INS has "authorized" the person to engage in employment in this country. Multiple problems are raised by this procedure.

As previously noted, INS may place persons in various discretionary categories if the person's actual immigration status is in question. However, INS may determine for any number of reasons that it will not issue the person an I—94 form. For example, a person may enter the United States without inspection and thereafter apply for political asylum. It is entirely discretionary with INS whether to issue an I—94 form to this person. Or a permanent resident alien may be suspected of being deportable for one of any number of reasons. INS policy is to immediately confiscate the person's documentation and an I—94 form may or may not be issued to the person in place of the documents taken away. Alternatively, an alien may be in the United States lawfully as a non-immigrant, or unlawfully, and may be named in an immigrant petition filed by a close relative. INS may or may not issue such person an I—94. A further situation may involve an alien who claims a right to permanent resident status in the United States but who is presently undocumented. INS may either schedule a deportation hearing to determine the claim or it may simply, through inaction, leave the person in limbo. And under either circumstance it may either issue or not issue an I—94 to the person claiming the right.

Secondly, INS may or may not, on any I—94 it issues, place a suggested departure date on the form. This problem is further exacerbated by the fact that INS may provide an I—94 form to a person prior to the initiation of a deportation hearing, and then may or may not indefinitely postpone the deportation hearing; or INS may provide an I—94 form subsequent to a deportation hearing, and the person is not obliged to leave the country, if a departure date is set on the I—94, and may instead exercise his/her right to such a due process hearing.

Finally, under any of these numerous options, INS may or may not note on the I—94 that employment is "authorized". Absolutely no statute or federal regulation concerns these options and, therefore, they are dealt with in an *ad hoc* and entirely inconsistent manner by INS. The INS practice of issuing I—94 forms to certain persons; of arbitrarily setting departure dates on these forms; and, of granting or denying "work authorization" is in all likelihood subject to challenge on multiple grounds. In fact, elements of these practices have been successfully challenged in the past.

It, therefore, appears as if strict compliance with 42 U.S.C. Section 502 (a) (25) (A), the social security number requirement, ultimately leaves INS with the power to assist or thwart, on a discretionary basis entirely, and aliens

ability to qualify for aid to needy families (Title IV—A) benefits. Despite this result, which is reached primarily because of the current structure of HEW regulations concerning the documentary requirements necessary to obtain a Social Security number, it is highly unlikely that Congress could have intended that an impoverished person's access to the basic necessities of life would ultimately lie in the hands of INS officers enforcing discretionary rules and policies which themselves are not firmly grounded in statutes or published regulations.

STUDIES INDICATE MINIMAL USE OF PUBLIC ASSISTANCE PROGRAMS BY UNDOCUMENTED ALIENS

The most comprehensive document on the use of public assistance programs by aliens was prepared by the Comptroller General of the United States for the Senate Committee on the Budget in 1977. The report is entitled "Impact of Illegal Aliens On Public Assistance Programs: Too Little Is Known", hereinafter "Comptroller's Report", and was published December 1, 1977. This report reviews a number of studies conducted on the question of undocumented alien reliance on public assistance programs. It was noted that "Department of Health, Education and Welfare (HEW) headquarters officials were able to provide little information regarding the extent of AFDC aid given to illegal aliens".[86] However, it is reported that "HEW required control checks of 45,000 AFDC cases" in nine states, including California and New York", and identified only 14 recipients as illegal aliens...".[87] Therefore, less than one-thirteenth of one percent of the sample checked were found to be ineligible due to alienage.

New York State welfare officials contacted by the Comptroller General believed that the impact of undocumented aliens on that state's welfare system was "insignificant", citing statistics from a quality control review of 1,228 AFDC cases in which "only 4 recipients...were found to be illegal aliens".[88] This accounts for one-third of one percent of the sample investigated.

The Comptroller General's staff interviewed 120 apprehended aliens in the Los Angeles — San Diego area, New York City, and Washington, D.C. They found that none of them said they had received AFDC benefits.

As already noted, a study conducted by San Diego County found that of 9,132 welfare cases examined, only 10 were determined to involve undocumented aliens.

In a major 1976 study conducted by researcher David North for the U.S. Department of Labor, 793 apprehended undocumented aliens were

[86] Specifically, 20 CFR Section 422.107.

[87] *Id.*, at 3.

[88] Comptroller's Report at Appendix II, page 2.

[89] *Id.*, at 4.

extensively interviewed in 19 locations around the country. Of those interviewed, only 0.5 percent had received welfare benefits in the United States.[89] Of those questioned in the North study, 27 percent had used hospitals and clinics. Of this 27 percent, 83 percent reported that they had paid for the care themselves. Consequently, approximately 4.6 percent had received some type of free health care.

In another study conducted by Wayne A. Cornelius of the Massachusetts Institute of Technology, 505 undocumented aliens were interviewed. Only 2.2 percent reported having received any welfare benefits while in the United States.

As noted by the Domestic Council Committee on Illegal Aliens, chaired by Edward Levi while he was Attorney General of the United States, and made up of the Secretaries of Agriculture, Commerce, HEW, Labor, State and Treasury, in their Preliminary Report of December, 1976:

> It has frequently been alleged that illegal aliens produce a substantial drain on public services such as welfare, food stamps, hospital care, public education, etc. Several of the studies which base their conclusions on hard data contradict this assertion. Preliminary Report at 150—151.

The Comptroller General of the United States simply concluded that "(i)nsufficient data exists to estimate the extent of use of public assistance programs by illegal aliens".[90]

CONCLUSION

There are numerous things which this analysis has not accomplished. It has not carefully analyzed for the reader the various residency requirements contained in the statutes and regulations of Titles IV—A, XVI and XIX. These may, upon closer scrutiny, establish flaws in HEW's regulations concerning alienage and eligibility for program benefits. It has not analyzed the history of alien eligibility for federal benefits prior to 1971. Again, such an examination would undoubtedly increase one's understanding of current statutes and regulations and assist in determining whether current HEW regulations accurately reflect Congressional intent in this area. This study has not analyzed the HEW handbook sections which further interpret and implement for federal regulations.

Hopefully, what has been accomplished is to provide a basic understanding of a very complex area, in which Congress has largely refrained from

[89] *See.* U.S. Department of Labor, Manpower Administration: *Illegal Aliens: Their Characteristics and Role in the U.S. Labor Market*, by David North and Marion F. Houstoun, 1976.

[90] Comptroller's Report at Appendix H, page 16.

action, while HEW has promulgated and repromulgated regulations increasingly catapulting itself into the business of immigration law. In a sense, HEW has been left to define an extremely elusive concept, namely the parameters of that category of aliens who are residing in the United States "under color of law". Either through design or due to an increasing confusion over the task on the part of HEW, the role of INS appears to be growing in the area of qualifying persons for federal assistance programs. As noted above, INS involvement principally occurs through its power over the issuance of I—94 forms, which are relied upon so exclusively by HEW, a power which INS wields with virtually no statutory or regulatory guidelines.

HEW continues to impose an "under color of law" standard in implementing Titles IV—A and XIX, despite the lack of statutory authority for such an approach. Given the amorphous nature of this concept, providing greater definitional content would probably decrease the vagrancies of State agency interpretations and avoid the pitfalls uncovered in *Graham v. Richardson*.

Clearly the consensus of the objective studies conducted in this area indicates that the public and often political hue and cry that has been raised over alien reliance on the welfare system is unfounded. Efforts need to be made to correct the harmful and erroneous notions on this issue which are currently pervasive in the public mind and hinder any constructive efforts to solve the problem.

It appears that the next stage of action should focus on refining and identifying those exact classes of aliens who have sufficient ties within the country to justify their inclusion in the broader category of those who are present "under color of law". This task should avoid the current approach of relying exclusively on the Immigration Service to either issue or deny a Form I—94 to any alien who may be residing in the United States "under color of law". It should instead explore the numerous positions that a person may hold in relation to the Immigration and Nationality Act, and should then reach decisions, capable of fair and consistent enforcement, on which precise categories will be included and excluded from participation in program benefits.

8

Discretionary Relief From Deportation

HERMAN L. BOOKFORD*

GENERAL CONSIDERATIONS

ALTHOUGH this discussion is concerned primarily with the relief available to an alien who is the subject of deportation proceedings, I will also briefly mention another type of discretionary relief available to aliens who are illegally in the United States. This is the discretion of the prosecutor or, in this case, the district director, to refrain from instituting deportation proceedings in appropriate cases.

Operations Instructions Section 103.1 (a) (1) (II) provides that the District Director may place a case in the "Deferred Action" category, formerly designated "Non-Priority", if he determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors. Among the factors considered are: 1) advanced or tender age; 2) many years presence in the United States; 3) physical or mental condition requiring care or treatment in the United States; 4) family situation in the United States and the effect of expulsion; and 5) criminal, immoral or subversive activities or affiliations in recent conduct. The District Director's recommendation must be approved by the Regional Commissioner. Authority to exercise prosecutorial discretion is vested solely in enforcement officers. Immigration judges and the Board of Immigration Appeals do not have such authority.[1]

In the case of *Lopez-Telles v. INS*, the alien requested the immigration judge to terminate the deportation proceedings on "humanitarian" grounds, but the court held that the judge did not have the power to terminate for such reasons.

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[1] *See, Lopez-Telles v. INS*, 564 F.2d 1302 (9th Cir., 1977).

The statutory provisions with which we are concerned usually declare that the requested relief "may" be granted "in the discretion of the Attorney General". The Attorney General's authority has been delegated and is exercised, in the first instance, by immigration judges, whose decisions may be appealed to the Board of Immigration Appeals.

Applications for discretionary relief usually have two separate and distinct facets: 1) the applicant must first demonstrate that he meets whatever eligibility requirements are set forth in the statute and the regulations, and 2) the applicant must show that the facts in his case warrant the favorable exercise of discretion. On both issues the applicant has the burden of proof.[2] When an applicant invokes the Fifth Amendment privilege and refuses to answer questions relating to matters within his knowledge which have a direct bearing on his eligibility; he has failed to meet the burden of proof and discretionary relief may properly be denied.[3]

In the *Kimm v. Rosenberg* case, the Supreme Court held that suspension of deportation was properly denied when the applicant refused to answer questions about membership in the Communist party. In the *Marquez* case, the Board of Immigration Appeals held that suspension of deportation and voluntary departure were properly denied. The applicant had approximately $54,000 in his possession when stopped for a traffic violation, and in the deportation proceedings he claimed the Fifth Amendment privilege against self-incrimination concerning the ownership and source of the money. The applicant thereby failed to meet the burden of proof to establish eligibility for the benefits he sought. Ordinarily the question of eligibility is considered first by the official deciding the application for discretionary relief. Thereafter, the question whether the relief is merited as a matter of discretion is considered. However, an immigration judge may deny an application for relief solely in the exercise of discretion without determining eligibility where it is appropriate to do so.[4]

One of the requirements connected with most types of discretionary relief, is that the applicant establish good moral character for a specified period. Section 101 (f) of the Immigration and Naturalization Act lists eight separate classes of persons who are specifically declared to be persons lacking good moral character. However, this section also states that the fact that a person is not within any of the described eight classes shall not preclude a finding that, for other reasons, the person is not or was not of good moral character. Furthermore, even where good moral character is not specifically set forth as a requirement for the discretionary relief which is

[2] 8 CFR 242.17 (d).

[3] *See, Kimm v. Rosenberg*, 363 U.S. 405 (1960); *Matter of Marquez*, I.D. 2352 (1975).

[4] *See, INS v. Bagamasbad*, 429 U.S. (1976).

requested, it may still be considered in connection with the question whether discretion should be favorably exercised.[5]

It is important to note that applications for voluntary departure, for temporarily withholding of deportation under Section 243 (h), or for creation of lawful permanent resident status under Sections 244, 245, or 249 of the Act, must be made only during the hearing. To protect the rights of aliens seeking such discretionary relief, such applications do not constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability.[6]

VOLUNTARY DEPARTURE

Voluntary departure is the most frequently requested form of discretionary relief. Persons who have been deported may not return to the United States without special permission, under Section 212 (a) (17) of the Act. A deportee who enters or who attempts to enter the United States without obtaining such special permission may be prosecuted for having committed a felony, under Section 276 of the INA. Furthermore, a person who leaves the United States voluntarily is not required to remain outside the country for any fixed period, but may return immediately if he is in possession of the necessary documents. Also, such an alien may select the country to which he wishes to depart voluntarily, and may go to any country that will accept him. The number of countries to which a person may be sent under an order of deportation, on the other hand, is strictly limited by Section 243 (a).

Voluntary Departure Before Proceedings

Under Section 242 (b) of the Immigration and Naturalization Act, deportation proceedings and a finding of deportability are not required when an alien admits that he is deportable, unless the Attorney General has reason to believe that the alien is deportable on the more serious grounds such as those relating to criminals; aliens involved in prostitution; narcotics violation; and others specified in paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of Section 241 (a). Usually such aliens pay their own way out of the United States, but the statute authorizes the Service to pay for the cost of their removal if deemed to be in the best interests of the United States. Along the Mexican border hundreds of thousands of such cases are handled by granting voluntary departure without a hearing.

[5] *See, Matter of Francois*, 10 I&N. Dec. 168 (1963).

[6] 8 CFR 242.17 (d).

Voluntary Departure After Deportation Proceedings Commenced

Under Section 244 (e), those aliens ineligible for voluntary departure before a hearing, because of their deportability on the more serious grounds, as set forth previously, are also ineligible for voluntary departure during the deportation proceedings, unless they can establish eligibility under Section 244 (a) (2) of the Act, relating to suspension of deportation. This requires continuous physical presence in the United States and good moral character for at least ten years preceding the application. One requirement imposed on these aliens eligible for voluntary departure during deportation proceedings under the statute is that they must show that they have been persons of good moral character for at least five years immediately preceding the application. By regulation, two additional requirements are imposed on the applicant for voluntary departure; he must establish that he is willing and, has the immediate means with which to depart promptly from the United States.[7] Thus an alien who states that he is unwilling to leave the United States promptly, for example, because he wants to return to school and finish his studies which will require another year is ineligible for voluntary departure. Also, an alien who states that because of lack of funds he is unable to purchase an airline ticket or other appropriate transportation out of the country, is ineligible.

Factors in Exercising Discretion

General standards for exercising discretion in voluntary departure cases are laid down in *Matter of M...* .[8] If the alien entered as a crewman, the questions to be determined are: how long he has engaged in that calling; whether he has violated the immigration laws on the occasion of previous entries into the United States; whether he was previously granted voluntary departure; and whether he was a bonafide crewman or merely used that device to enter the United States. Other factors to be considered regardless of the manner of entry into the United States, are, whether the alien tried to escape when questioned by officers of the Service; whether he had previously made false statements to the Service, such as when applying for extensions of stay, how long had he resided in the United States; what his family ties are; and what hardship, if any, would be involved were he to be deported.

[7] 8 CFR 244.1.

[8] *See Matter of M...*, 4 I&N. Dec. 626 (1952).

Departure Date

The order of the immigration judge granting voluntary departure allows a reasonable time, usually a minimum of 30 days, for such departure. The order also provides that a deportation order will be entered if the alien fails to depart within the time fixed or within an authorized extension. Such extensions may be granted only by the District Director or the officer to whom he has delegated authority, usually the deportation officer.[9] After the departure time fixed by the immigration judge or by the District Director has expired, the alien may move to reopen the proceedings for the purpose of having the immigration judge make another grant of voluntary departure. If the judge does so, the departure time is then fixed by the District Director.[10]

If the date fixed for voluntary departure has expired, and a deportation order has been entered, the departure of the alien thereafter at his own expense will constitute self-deportation, under the provisions of Section 101 (g) of the Act.

SUSPENSION OF DEPORTATION

Under Section 244 (a) of the Act, suspension of deportation is divided into two categories. The first consists of aliens who are deportable for relatively minor violations of the immigration laws, such as remaining longer than authorized, failure to maintain status, etc. These aliens must establish that they have been physically present in the United States for a continuous period of at least seven years immediately preceding the date of their application; that during such period they have been persons of good moral character; and that their deportation would result in extreme hardship to themselves or to certain close relatives. The second category applies to persons deportable on more serious grounds, such as those who have been convicted of crimes involving moral turpitude, or a violation of the narcotics laws; those who are deportable as subversive; or those involved in activities connected with prostitution. These aliens must establish continuous physical presence and good moral character for a period of ten years, and they must also show that their deportation would result in exceptional and extremely unusual hardship to themselves or to certain specified close relatives.

Disqualified Classes

Under Section 244 (f), an alien who has the required residence, good moral character, and extreme hardship is nevertheless ineligible for suspension of

[9] 8 CFR 244.2.

[10] *See, Matter of Yeung*, 13 I&N. Dec. 528 (1970).

deportation if he or she entered as a crewman after June 30, 1964, as an exchange visitor, or as a native of contiguous territory or an adjacent island, unless ineligible for a visa as a special immigrant. However, legislation enacted in 1976 ended the designation of "special immigrant" for natives of the Western Hemisphere and there is, therefore, no bar at this time for natives of contiguous countries and adjacent islands who apply for suspension of deportation.[11]

Residence

Under Section 244 (b), an alien who was inducted into the armed forces in the United States, and thereafter served a minimum of 24 months in an active duty status before being separated under honorable conditions, need not meet the continuous physical presence requirements applicable to other persons applying for suspension of deportation. Furthermore, such an applicant need only show good moral character between the date he filed his application for suspension and the date it was finally adjudicated.[12] The required period of continuous physical presence is not broken by brief, casual visits to contiguous countries.[13]

It has been held, however, that an alien absent for six weeks, who went to Germany to visit a sick sister, and thereafter re-entered the United States through misrepresentation, had interrupted the required continuous presence in the United States.[14] In the case of *Heitland v. INS*, the aliens returned to the United States intending to reestablish permanent residence in Brooklyn. The husband used a transit visa, stating he would transit the United States to Canada, and the wife obtained a visitor's visa.

Hardship

The distinction between "hardship", which is required in seven-year cases, and "exceptional and extremely unusual hardship", which is required in ten-year cases, cannot be defined precisely. However, the Board of Immigration Appeals has enumerated certain general criteria to be considered in deciding whether hardship exists: 1) the length of residence in the United States; 2) the family ties in this country; 3) the possibility of obtaining a visa abroad; 4) the financial burden on an alien of having to go abroad to obtain a visa;

[11] *See. Matter of Finlayson*, Int.. Dec. 2569 (1977).

[12] *See. Matter of Woo*, 10 I&N. Dec. 347 (1963).

[13] *See. Wadman v. INS*, 329 Fed. 812 (9th Cir. 1964); *Matter of Wong*, 12 I&N. Dec. 271 (1967).

[14] *See. Heitland v. INS*, 551 F.2d 495 (2nd Cir. 1977).

and 5) the health and age of the alien.[15] Economic detriment is not sufficient, in itself, to establish extreme hardship.[16] Furthermore, the fact that the alien has children who are United States citizens but who could not remain in this country if the parents were deported, does not qualify as extreme hardship.[17]

Procedure

Applications for suspension of deportation are filed on Form I—256A and the fee is $65.00. Only persons who are deportable are eligible for suspension of deportation; hence persons who are excludable may not obtain such relief.[18] When an application for suspension has been granted, either by the immigration judge or by the Board of Immigration Appeals, the case is referred to Congress for final approval or rejection. Congress has until the close of the session in the year following the year in which the case was submitted, to act. In the seven-year case, if Congress takes no action, the applicant becomes a permanent resident; but in the ten-year case, Congress must affirmatively approve the case before permanent resident status is granted.[19] While it is true that, if the Administration's proposed amnesty law, concerning these aliens in the United States since 1970, should become effective; most of the aliens eligible for suspension of deportation will be able to obtain relief more easily under the amnesty proposal. Regardless of this, suspension of deportation will still be the only relief available in many cases, such as those who are ineligible for admission to the United States because they are classified as criminals, narcotics law violators, alien smugglers, subversives, or prostitutes or procurers.

REGISTRY

Registry is a remedy provided by Section 249 of the Immigration and Naturalization Act for persons who have had a long residence in the United States. It is available to aliens who meet these conditions: 1) there is no record of the alien's admission for permanent residence; 2) the alien is not inadmissible as a criminal, procurer or other immoral person, subversive, violator of the narcotics laws, or smuggler of aliens; 3) the alien entered the United States prior to June 30, 1948. The original cut-off date was May 1?, 1921; this date was advanced by later statutes to July 1, 1924, June 28, 1940,

[15] ***See, Matter of S...***, 5 I&N, Dec. 409 (1953); ***Matter of U...***, 5 I&N, Dec. 413 (1953).

[16] ***See, Kasravi v. INS***, 400 F.2d 675 (9th Cir. 1968).

[17] *See, Lee v. INS*, 550 F.2d 554 (9th Cir. 1977).

[18] *See, Matter of L... Y... Y...*, 9 I&N, Dec. 70 (1960).

[19] Section 244 (c).

and finally to June 30, 1948; 4) the alien has had residence in the United States continuously since such entry; 5) the alien is a person of good moral character; and 6) the alien is not ineligible for citizenship.

In connection with these requirements, it should be noted that the statute requires continuous *residence* since entry, as opposed to the suspension of deportation statute, which requires continuous physical presence. Hence, temporary absences do not bar the applicant from establishing the required continuous residence.[20] In connection with the good moral character requirement it should be noted that the applicant is required to establish only that he is presently a person of good character; no fixed period of good moral character is required.

Procedure

Applications for registry under Section 249 are made on Form I—485, to which should be attached Form G—325A. The fee is $25.00. The alien may apply for a waiver of inadmissibility if he is inadmissible on a ground which bars eligibility.[21] If the applicant proves that his entry occurred prior to July 1, 1924, a record of lawful admission for permanent residence is created as of that date; otherwise the record is effective as of the date the application is approved. This form of relief has had very limited application in recent years, since it requires the applicant to demonstrate that he entered the United States before June 30, 1948. Most such persons, in the 30 years following that date, have been successful in obtaining other forms of relief. However, many thousands of applications can be anticipated if the Administration's proposal to advance the cut-off date from June 30, 1948, to January 1, 1970, should become law.

ADJUSTMENT OF STATUS

Eligible Classes

Aliens in the United States in a status other than that of permanent resident may adjust their status and become lawful permanent residents of the United States under Section 245 of the INA. Under the most recent statutory amendments, effective January 1, 1977, the following conditions must be met: 1) the alien must have been inspected and admitted or paroled into the United States; 2) the alien must be eligible to receive an immigrant visa and must be admissible to the United States for permanent residence, and 3) an

[20] *See, Matter of Harrison*, 13 I&N. Dec. 540 (1970).
[21] 8 CFR 249.1.

immigrant visa must be immediately available to him at the time the application is filed. The first requirement means that one who entered without inspection is not eligible for adjustment. Similarly, a person who entered on a willfully false claim to American citizenship is deemed to have entered without inspection, and is also ineligible.[22]

The statute provides that a formal application for adjustment must be filed; this is done on Form I—485, for which the fee is $25.00. Although aliens who are inadmissible may not adjust their status, aliens who have close relatives in the United States, and who are excludable because afflicted with tuberculosis, or because of mental illness; criminal or immoral activity; or procurement of entry documents by fraud, may obtain a waiver of excludability under Section 212 (g) (h) or (1). Aliens seeking adjustment on the basis of a preference are subject to the quota limitations in the lists issued each month by the Visa Office of the Department of State, showing the availability of the various preferences in designated foreign states. However, quota limitations do not apply to immediate relatives, who are defined in Section 201 (b) as the children, spouses and parents of a United States citizen. In the case of parents, the citizen must be at least 21 years old. Although the statute does not require applicants for adjustment under Section 245 to demonstrate good moral character, that may be considered as a factor in connection with the exercise of discretion.[23] By the amendment of Section 245 in 1965, natives of the Western Hemisphere were made ineligible for adjustment. Their eligibility was restored on January 1, 1977.

Ineligible Aliens

The first group specifically prohibited from adjustment under Section 245 are crewmen. Under 8 CFR 245.1 aliens are deemed to be crewmen if, on arrival, they were serving in any capacity on board a vessel or aircraft, or they were destined to join a vessel or aircraft in the United States to serve in any capacity. The second group presently barred from adjustment under Section 245 consists of aliens, other than immediate relatives, who continue in or accept unauthorized employment prior to filing an application for adjustment of status. This provision became effective on January 1, 1977. It was ameliorated to some extent when the Service decided that it would grant *nunc pro tunc* permission to work in the United States to two classes of aliens. These classes were those who had attempted to file adjustment applications simultaneously with a visa petition, but had been rejected because of error on the part of Service personnel; and, as under court order

[22] *See, Matter of S....* 9 I&N, Dec. 599 (1962).

[23] *See, Matter of Francois*, 10 I&N, December 168 (1963).

in the *Silva v. Levi* case, those Western Hemisphere natives who were improperly denied visa numbers because of the erroneous assignment of Western Hemisphere numbers to Cuban refugees. The third type of alien barred under this section is one who is admitted in transit without a visa.

It should be noted that two important changes became effective on January 1, 1977. Western Hemisphere natives were made eligible for adjustment, and persons working without permission before filing an application for adjustment were made ineligible, unless they qualify as immediate relatives of United States citizens.

Favorable and Adverse Factors

In exercising discretion, adjustment is ordinarily granted in the absence of adverse factors. Where adverse factors are present, it is necessary for the applicant to offset them by showing unusual or even outstanding equities. Generally, favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting the favorable exercise of discretion.[24] Unfavorable factors include lack of good moral character; preconceived intent to remain in the United States; abandonment of family abroad; and misrepresentations in obtaining a visa or labor certification.

WAIVER OF DEPORTABILITY FOR ALIENS WITH SEVEN YEARS RESIDENCE

Section 212 (c) of the Immigrant and Naturalization Act provides that, in the discretion of the Attorney General, certain aliens who are excludable from the United States may be given a waiver of excludability. The statute requires that: 1) the alien had been lawfully admitted for permanent residence; 2) the alien temporarily proceeded abroad voluntarily and not under an order of deportation; 3) the alien is returning to a lawful unrelinquished domicile of seven consecutive years; and 4) the alien's excludability be based on grounds included in Sections (1) through (25), (30) and (31) of Section 212 (a). This means that the only aliens ineligible are those excludable on subversive grounds. Until 1976 the statute was interpreted literally and only persons who had left the United States and sought to re-enter were deemed eligible for relief under this section. Aliens who remained in the United States were denied the benefits of this relief. In *Francis v. INS*,[25] the Court of Appeals for the Second Circuit stated that the

[24] *See, Matter of Arai*, 13 I&N. Dec. 494 (1976).

[25] *See, Francis v. INS*, 532 F 2d 268 (2d Cir. 1976).

distinction between aliens who had left the United States and aliens who remained, was an irrational and unconstitutional discrimination, and that the waiver was available to aliens who had remained in the United States. Following the decision of the Board of Immigration Appeals in *Matter of Silva,*[26] the Service has adopted the same view. The Second Circuit Court of Appeals also decided, in *Lok v. INS,*[27] that the unrelinquished domicile of seven consecutive years need not consist of seven years of lawful permanent residence. The court held that seven years of domicile in the United States would be sufficient, as long as it was lawful domicile. However, the Board of Immigration Appeals, in *Matter of Anwo,*[28] stated that it would not follow the *Lok* decision outside the Second Circuit. Under the Board's ruling, relief under Section 212 (c) is available only to an alien who has established a lawful permanent residence and has maintained it for seven years.

[26] *See. Matter of Silva.* I.D. 2532 (1976).
[27] *See. Lok v. INS.* 548 F.2d 37 (2nd Cir. 1977).
[28] *See. Matter of Anwo.* I.D. 2604 (1977).

9

Appeals and Judicial Review

JACK WASSERMAN*

APPEALS TO BOARD OF IMMIGRATION APPEALS IN WASHINGTON, D. C.

I mean no disrespect to people like Betty Jo Harper or any other government officials, but if you can pursue a successful appeal and overturn the despotism of one arbitrary bureaucrat, you will experience a feeling of overwhelming elation.

To be able to do this you must engage in thorough preparation, know the rules of appellate procedure, master the facts, and research the substantive law.

The appeal itself can take several forms. First, you can appeal to the Board of Immigration Appeals. As most of you may know, the time limitation is important. In deportation, the limit is 10 days, adding three for mail; in an oral exclusion, the appeal is the same day. If you get the exclusion at the end of the day, you may ask the immigration judge to hold it until the next day so you can write out the appeal and pay the fee. On redetermination, you have five days; and for denial of a relative petition you have fifteen days. Be sure to file your notice of appearance and a $50 fee. Know, read and understand 8 CFR, Part 3. Request an oral argument and set forth succinctly the basis for the appeal. Submit a brief, as the Board likes it. It will help you get your argument together and know what you are attacking. Consult the Appellate Trial Attorney. Review the Record at the Board and the Board of Immigration Appeals Index. It is very helpful to prepare a succinct oral argument. Do not spend too much time on the facts; stress the main legal point. I used to appear before Judge Holtgoff in the District of Columbia and he had a way of saying "...tell me in one sentence what the

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case is about". If you can master that ability you will be able to hit on the main point in your case. Go to the Board and listen to some oral arguments. Examine some previous briefs that have been filed; you will learn a great deal.

PETITIONS FOR JUDICAL REVIEW OF DEPORTATION ORDERS IN COURT OF APPEALS

8 U.S.C. 1105a (a) (1976)

1) Exclusive remedy for review of final deportation orders but does not preclude *habeas corpus*. It includes all determinations by immigration judge and Board of Immigration Appeals,[1] *and encompasses motions to report deportation proceedings.*[2] It does not include other determinations not made during the course of deportation proceedings before an immigration judge nor does it include denial of a stay of deportation by a District Director.[3]

2) Venue in Court of Appeals where deportation hearing is conducted or of alien's residence.

3) Six months time limitation from date of final order of deportation.

4) Necessity of exhausting administrative remedies.

5) Respondent is the Immigration and Naturalization Service.

6) Review confined to administrative record.

7) Grounds for remand to adduce additional facts and applicability of 28 U.S.C. 2347 (1970) where such additional facts are material and there were reasonable grounds not to adduce evidence before the agency.

8) Referral to district court where issue of United States citizenship.[4]

9) Form of Petition for Review set forth in Form No. 3 of Appendix of Forms and Rule 15, Federal Rules of Appellate Procedure and following:

10) Service of Petition for Review required upon Attorney General and upon District Director or Officer in Charge in district where clerk's office is located. Service stays deportation.

11) Filing of administrative record within 40 days after filing of petition for review. Petitioner's brief due within 40 days thereafter and respondent's

[1] *Foti v. Immigration and Naturalization Service*, 375 U.S. 217 (1963).

[2] *Giova v. Rosenberg*, 379 U.S. 18 (1964).

[3] *Kwok v. Immigration and Naturalization Service*, 392 U.S. 206 (1968).

[4] *Agosto v. INS*, 436 U.S. 748 (1978).

brief due within 30 days. 14 days for reply briefs. Typewritten briefs permitted.[5]

12) Oral argument. Time limitations.

13) *Certiorari* to Supreme Court.[6]

You may also take appeals to the judicial branch. This can be done in two ways. From a final deportation order a petition for review may be filed in the Court of Appeals in the district where the hearing was held or where the alien resides. It must be filed within six months. Read U.S.C. 1105a, which I understand, was enacted to curtail litigation but never did.

File your type of appeal or petition for review as set forth in the Federal Rules of Appellate Procedure. The filing fee is $50, and the petition must be filed within six months. I generally file about six copies, three for the court, and additional copies which must be served on the District Director and the Attorney General. In addition to that, since the filing acts as a stay of deportation, I personally advise the deportation officer that I have filed a petition and give him a copy. The Administrative Record must be filed within forty days, and briefs are required from the petitioner within forty days after the filing of the Record. The appellee, which would be the government, has thirty days thereafter, and a reply brief is due fourteen days later. I would welcome legislation prescribing that time limitations for the filing of all appeals and for all the other things that must be done, should be in multiples of ten rather than the present numerous different time limitations that occur in matters regarding immigration. In the new edition of my book, which is to be published this year,[7] I have a fourteen page appendix entitled, "Time Limitations Prescribed by Statutes and Regulations". This appendix shows the large span of time limitations.

Review is confined in the Court of Appeals to the Administrative Record. However, there are two important exceptions. The case can be remanded for further evidence under 28 U.S.C. 2347 (1976), if material facts have developed and if there was a basis for not introducing them previously; or the case can be remanded to the district court for a hearing on the issue of citizenship. In this connection, you will want to read *Agosto v. the Immigration Service*, 436 U.S. 748 (1978). In the Court of Appeals, the alien is the petitioner and the Immigration and Naturalization Service is the respondent. You may file typewritten briefs, mimeographed briefs, or photostated copies. If you file a printed brief, and sometimes I do this even

[5] Consult Rules 17, 28, 31 of Rules of Appellate Procedure, local court rules and 8 U.S.C. 1105a (a) (1976).

[6] 28 U.S.C. 1254 (1970); *Stern and Grossman, Supreme Court Practices* (Fifth Ed. 1978).

[7] Jack Wasserman, *Immigration Law and Practices*, 3rd ed. (ALI – ABA).

when I am filing a typewritten brief, there is a color scheme. The petitioner files the main brief in blue, the government files the reply brief in red.

You may get an oral argument in the Court of Appeals; it depends upon the Court of Appeals, and upon the case. If you do get an oral argument, it may be limited. In the Court of Appeals in the Second Circuit you sometimes get as little as ten minutes. If you have such a time limitation, prepare the oral argument so that you spend one minute on the facts and nine minutes on the argument. Be prepared to put your main points into the oral argument.

Here again I recommend listening to an oral argument in the Court of Appeals, to see how briefs are prepared. You have ninety days to go to the Supreme Court on a writ of *Certiorari*. Once again I recommend that you listen to an oral argument in the Supreme Court. Observe how the government prepares briefs and argues cases in the Supreme Court and you will learn a great deal.

DECLARATORY JUDGMENT ACTIONS TO REVIEW OTHER IMMIGRATION DETERMINATIONS

1) Applicability of 28 U.S.C. 2201 (1976); 5 U.S.C. 701—706 (1976); 8 U.S.C. 1329 (1976); 28 U.S.C. 1331 (1970).
   (a) Inapplicability of 5 U.S.C. 701—706 (1976).[8]
   (b) Applicability of 8 U.S.C. 1329 (1976) and 28 U.S.C. 1331 (1970) as amended by P.L. 94—574 (90 Stat. 2721).[9]
   (c) Availability of review for labor certification denials.[10]
   (d) Unavailability of review for denials of consular decisions.[11]
   (e) Unavailability of review of denials of political asylum requests.[12]
2) Describing defendant by his official title.[13]
3) Action must be brought in judicial district of (a) defendant's residence, (b) where cause of action arose, or (c) where plaintiff resides.[14]

[8] *Califano v. Sanders*, 430 U.S. 99 (1977).

[9] *Acosta v. Gaffney*, 558 F.2d 1153 (3rd Cir., 1977) reversing 413 F.Supp. 827 (D. N.J. 1976) and *Pierre v. United States*, 525 F.2d 933 (5th Cir., 1976).

[10] *Secretary of Labor v. Farino*, 490 F.2d 885 (7th Cir., 1973); *Pesikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir., 1974), cert. denied 491 U.S. 1038 (1974).

[11] *Rivera de Gomez v. Kissinger*, 534 F.2d 518 (2nd Cir., 1976), cert. denied 429 U.S. 897 (1976); *Burrofato v. U.S. Department of State*, 523 F.2d 554 (2nd Cir., 1976) cert. denied, 423 U.S. 920 (1976).

[12] *Cen Chaun-Fa v. Kiley*, 459 F.Supp. 762 (D.C.S. D. N.Y., 1978). Is this ruling valid?

[13] Rule 25 (d) (2) of Federal Rules of Civil Procedure.

[14] 28 U.S.C. 1391 (e) (1970) as amended by P.L. 94—574 (90 Stat. 2721).

SCOPE OF REVIEW

1) Clear and convincing and unequivocal evidence required to support alienage and deportability.[15]

2) The reviewing court is authorized to set aside agency action, findings and conclusions,[16] which are:

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(b) contrary to constitutional right, power, privilege, or immunity;

(c) in excess of statutory jurisdiction, authority, or limitations or short of statutory right;

(d) without observance of procedure required by law;

(e) unsupported by substantial evidence in a case subject to Sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or,

(f) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

3) Declaratory judgment action and trial *de novo* available for those claiming United States citizenship.[17]

You can obtain judicial review by going into the district court. On the plane going to Jacksonville I asked myself how many different types of cases there are in the District Court. I enumerated ten: 1) declaratory judgments and review of labor certification; 2) reviewing most District Directors' decisions; 3) Freedom of Information Act and privacy litigation; 4) *habeas corpus* to review an exclusion proceedings, which is the exclusive way; 5) *habeas corpus* to review deportation proceeding, which is an alternate way. There is no time limit in bringing *habeas corpus* except to be sure to bring it before your client is deported. There also may be: 6) a criminal action involving the immigration laws; 7) civil actions involving immigration penalties or forfeitures; 8) a *de novo* trial of citizenship claims; 9) naturalization process; and 10) denaturalization process. You must be prepared to go into the district court.

Say you file a complaint involving the government. I have such a case pending which contends that there was an illegal arrest and an illegal invasion of the privacy of Blackie's Restaurant in Washington. The government has more than the usual defendants, so it may take the sixty

[15] *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276 (1966).

[16] 5 U.S.C. 706 (1970). *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Camp v. Pitts*, 411 U.S. 138 (1973).

[17] *Rusk v. Cort*, 369 U.S. 367 (1962); *Agosto v. INS*, 436 U.S. 748 (1978).

days allowed to answer that complaint, or it may ask for additional time. Suddenly you could be faced with a motion to dismiss or a motion for summary judgment which you only have ten days to answer. Of course the government can call upon their litigation section, the Justice Department, the General Counsel of the Immigration Service and everyone else in the government to assist. The Government will be all ready for you. Will you be ready? I am and I recommend that you be.

Prepare your substantive research before filing your complaint and know the jurisdictional basis for your action. I remember one year before 8 U.S.C. 1105 (a) (1976) I must have filed hundreds of declaratory judgement actions. In every one of them the government made motions to dismiss for lack of jursidiction.

In the District Court, review is controlled by 8 U.S.C. (1976), and that is very simple. It merely states that in the Immigration Act, the District Courts of the U.S. shall have jurisdiction over all civil and criminal cases arising under any of the provisions of this title. I have never seen "this title" interpreted until this year. In New York a law suit was brought to review a political asylum claim and it was thrown out for lack of jurisdiction. The judge, I believe erroneously, said it was under Title I, which is the general provisions of the Immigration Law, and not under Title II. I can assure that alien is here under Title II; he is either an excludable alien, an overstayed alien, or in legal status when he filed a political asylum claim. I complained to Murray Roberts of *Interpreter Releases*, when, in his write up, he did not criticize that decision. He promised me that he would do so in a subsequent issue when he reviews another case following the same decision. You should also know 28 U.S.C. 1391 (1976) which provides that a civil action, in which a defendant who is an officer or employee of the U.N. or any agency thereof, and who is acting in his official capacity or under color of legal authority, except as otherwise provided, may be brought in any judicial district where a plaintiff or defendant resides, or where the cause of action arose. I think this provides jurisdiction.

Furthermore, you should know the declaratory judgment provision of the law. I don't know why this is not invoked these days. It provides that wherever there is a dispute between parties, let us say between an alien and an agency, there is jurisdiction to bring a law suit in the federal courts, 28 U.S.C. 2201 (1976). Cases you should read to be sure of jurisdiction are: 1) *Califano v. Sanders* 430 U.S. 99 (1977), which holds that you cannot invoke the Administrative Procedure Act for jurisdication; 2) *Acosta v. Gaffney* 558 F.2d 1153 (3rd Cir., 1977), which holds that you can bring the action under 8 U.S.C. 1329 (1976) and 28 U.S.C. 1391 (1976); and 3) *Pierre v. United States* 525 F.2d 933 (5th Cir., 1976). Also, be sure that there is

proper service. In the Blackie's case previously mentioned, we had two cases. In the first Blackie's case previously mentioned, we had two cases. In the first Blackie's case, not only did I sue to restrain the government, but also I sued particular officers who allegedly committed the illegal trespass. We gave the summons and the complaint to the marshal. The marshal undertook to serve only the District Director personally. With regard to all the other defendants he left the papers with someone, he claims, was an authorized agent. There was no question that the government was going to use the comeback that when you sue for money damages, you have to serve the defendant personally. Therefore, in the second Blackie's case we gave instructions to the marshall to serve these defendants personally. I cannot stress how important it is to have an overview of what you are doing. This, again, emphasizes preparation.

Years ago, when I brought one of my first *habeas corpus* cases for Carlos Marcello, I went to New Orleans unsure that I could win on the *habeas corpus*, although I knew I was right. Marcello was in jail and the government said it was going to deport him. I saw to it that the government had no place to deport him. I went before Judge Skelly Wright and he denied my ***habeas corpus***. Then I moved for the release of Marcello on bail, and Judge Wright seemed to think there was no jurisdiction. My associates in New Orleans said that when we got to the Court of Appeals, an excellent one, he would be released. Before arriving in New Orleans I had prepared an appeal to the Court of Appeals. I filed a further application to Justice Black of the Supreme Court asking for release on bail and that is where I got my relief. I just kept filing the papers until I finally obtained release for Marcello. A similar thing happened to me in Chicago. I was representing Paul DeLucia, an alleged member of the Mafia. In court the judge not only denied relief but also ordered my client deported immediately. The Immigration Service took him to the Immigration Office and made arrangements to deport him that day or the next. I had an application prepared for the Court of Appeals which we filed that day and we immediately obtained his release on bail. You must look ahead and be prepared.

HABEAS CORPUS

1) See 28 U.S.C. 2241—2253 (1976).

2) Exclusive remedy in exclusion cases.

3) Available as an alternative remedy in deportation cases.

4) Available to test custody or restraint of liberty, neither of which need be physical. It is available to test parole, detainer or confinement to be

imposed in the future.[18] The threat of physical custody for deportation is sufficient.[19]

5) Must be sought against alien's custodian in the district in which he is detained.[20]

6) Denials by District Court appealable to Circuit Court of Appeals and by *certiorari* to the Supreme Court.

As I have indicated, *habeas corpus* is a very useful alternate remedy for review in the Court of Appeals. Recently, I had my choice in the Marcello case of bringing *habeas corpus* or going to the Court of Appeals. I am somewhat worried about the Court of Appeals in the 5th circuit. I see too many of the immigration cases decided without oral arguments, and I do not know what sort of short shrift might be made of a case. When I determined to bring *habeas corpus* within the allowed six months, the government first tried to say that I had to go to the Court of Appeals. We argued and briefed the issue of the availability of *habeas corpus* as an alternate remedy to direct review by the Court of Appeals. We have had four or five oral arguments and I hope to make the final oral argument on April 25th. Read 28 U.S.C. 2241, 2253; those are the provisions governing *habeas corpus*. There is also a text book on *habeas corpus*: Sokol, *Federal Habeas Corpus* (1969), which you will find a little out of date but very useful. Normally, in *habeas corpus* you prepare a petition. Charlie Gordon and I each have a copy in our respective books. The difference is that previously we used to apply directly for a writ and it would be issued. Presently, an order to show cause replaces the writ until the court considers it, and I believe it is generally returnable over a period of three to twenty-one days depending upon the judge. You are supposed to get very prompt action. The difficulty, however, is that you do not get an automatic stay. You either have to provide for that stay in your order to show cause, or as in the Marcello case, the judge did not give me a stay but he insisted that the Immigration Service promise to hold the *status quo* until the matter was decided. This is in the Court minutes.

FREEDOM OF INFORMATION AND PRIVACY ACT ACTIONS

1) 5 U.S.C. 552 (1976) and 5 U.S.C. 552 (a) (1976).

[18] *Jones v. Cunningham*, 371 U.S. 326 (1963); *Nelson v. George*, 399 U.S. 244 (1970); *Peyton v. Rowe*, 391 U.S. 54 (1968).

[19] *Vaya v. Rosenberg*, 237 F. Supp. 282 (S.D. Calif. 1964).

[20] *Schlanger v. Seamans*, 401 U.S. 487 (1971); *Ahrens v. Clark*, 335 U.S. 188 (1948), 28 U.S.C. 2248 (1970). *See*, Sokol, *Federal Habeas Corpus*, 1969; 28 U.S.C. 2241-2254 (1970).

2) Actions brought in District Court where *de novo* review is authorized.[21]

3) *Litigation Under the Freedom of Information Act* (Project on National Security and Civil Liberties of the ACLU, 1978);
O'Reilly, *Federal Information Disclosure* (1977);
1 Davis, *Administrative Law Treaties*, Second Edition (1978) Chapter 5.

You will find the Freedom of Information Act a very useful discovery tool and you should look at 5 U.S.C. 552, and 552 (a) (1976). Two useful books on Freedom of Information Litigation are by the ACLU in Washington, and by Davis on administrative law. I have received a wealth of material normally inaccessible under the Freedom of Information Act. I have done it in the Marcello case and in other cases. It can be invaluable especially if you know that the government has specific documents which you point out in your request. You must make a request, which they have ten days to answer. There is an administrative appeal and then you go into court. When you go into court the action is expedited by the District Court. The government has thirty days to answer and if the government asserts that it is exempt from releasing the material, it must justify that it comes within the exemption.

In conclusion, I should like to say that appellate and judicial review are available to make our administrative officials obey the law and their own regulations. Utilize these procedures not only to achieve justice for the alien but also to achieve a rule of obedience to law.

[21] 5 U.S.C. 552 (a) (4) (B).

10

Global View of Government Policies Concerned With Internal Migration

DONALD F. HEISEL*

IN the discussion of international migration policies in any one country, it may be useful to have background information about trends in policies of other governments. It can help to have comparative information simply to gain perspective and to see the range of policy options that have been taken by one country or another. In the unique case of international migration, an international perspective is useful because such movements by definition involve at least two countries. Thus, their respective policies are necessarily brought into contact.

The following brief comments are based on work done by the Population Division of the United Nations. As part of its regular programme, the Population Division prepares a biennial monitoring report on global population trends and policies. In addition, in 1979 the Population Division reported on the first overall quinquennial review and appraisal of progress toward the implementation of the World Population Plan of Action. To carry out these two tasks, a review was made of governmental policies regarding all major aspects of population, including international migration. One step in the project, taken in 1978, was to send a questionnaire on population policies to all governments. The information reported here is based largely on responses to that questionnaire, supplemented with other information gathered from a variety of sources and analyzed by the Population Division.

Three aspects of international migration are considered. Governments' perception of its importance, specific goals, and the measures taken to implement these goals. The comments refer to all 158 member states of the United Nations.

For overall perspective, governments were asked to indicate the extent to which any of the major demographic variables caused problems in their country, in relation to their ability to fulfill their economic and social development goals. The demographic variable identified most frequently,

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by 139 governments, as posing problems was internal spatial distribution and migration. The second most frequently mentioned issue, identified by 102 countries, was international migration. Fertility and mortality were mentioned a good deal less frequently, by about 80 governments each. It is also noteworthy that, in the case of international migration, developed countries are about as likely to refer problems with international migration as were developing countries.

On the other hand, not many governments perceive international migration as being of very great demographic importance. Emphasis is rather on its impact on social and economic development. Regarding immigration, 39 of the 158 governments reported that they considered it to be an important variable from a demographic point of view; while 55 governments consider emigration to be demographically important. The difference in the perception of the demographic importance of inward and outward movements largely reflects the extent to which most countries are better able to control immigration than they are emigration. Moreover, countries of net immigration are typically among the more highly developed, and hence better able to exercise controls over population movements across their frontiers.

Comparatively few governments report a desire to change the levels of international migration they are currently experiencing. Of course, an important part of the explanation is that governments can exercise a good deal of direct control over sheer numbers of international migrants. If a level is considered unsatisfactory, there are fairly direct steps that can be taken to try to change it. Some 13 governments indicate that current levels of immigration are unsatisfactory because they are too low while 8 governments indicate that current levels are too high. Nine countries, mostly in Latin America or in Africa, are taking active steps to raise their level of immigration. Regarding emigration, some 25 countries perceive present rates as unsatisfactorily high while 9 view their rates as too low. Six countries report current programmes to increase the rate of emigration while 25 countries are trying to slow it down. All other governments indicate that their present policy is to maintain the rates at current levels.

There also appears to be a growing tendency for governments to attempt to manipulate the qualitative character of international migration flows. The trend is clearly an outgrowth of the tendency to stress the social and especially the economic consequences of international migration. Governments thus are coming increasingly to desire to encourage or discourage international migration of specific types of persons in a manner they believe will best help them achieve their general economic and social development goals.

At the same time, it is striking to observe that there is comparatively little consensus among governments on how best to use international migration

as an economic and social development tool. Countries in the same region, which share very similar social and economic conditions, sometimes have very different migration policies. Although there is growing agreement that international migration can be a useful tool to help achieve development, there is far less agreement about how best to use the tool.

In order to implement socioeconomic and other policy goals through controls over international migration, virtually all governments make use of their conventional right to determine who may enter and under what terms. In addition, there appears to be a growing tendency for governments to reinforce their ability to deal with flows of migrants across their borders by means of agreements with other governments. International migration thus becomes more explicitly an element in international political relations and in the prevailing international economic order. By the same token, it becomes less commonly perceived as an issue involving one government and an individual mover. One particularly noteworthy manifestation of this tendency is the emergence in some regions of groups of countries that mutually permit almost completely unrestricted movement of their citizens across their frontiers, including migration in search of employment. Thus, international migration becomes a component of more general regional agreements for social and economic cooperation. The most outstanding examples are found in Europe within the European Economic Community and between the Nordic pact countries. There are also notable attempts to move in this direction within the Arab world and in Latin America.

Returning more directly to the subject of discussion, it must, of course be recognized that no individual country can or should even begin to work out its policy goals and measures simply by looking at such global trends. They are useful chiefly for the perspective they give. On the other hand, for an issue such as international migration, it will almost certainly become increasingly difficult to ignore the international context in which national policies are to be implemented.

11

Current Perspectives

ELIZABETH J. HARPER*

SINCE returning to Washington in September of last year (1978) to assume my present duties, I have become involved in various aspects of our immigration policy. I would like to describe three initiatives in regard to immigration, and discuss two areas where problems have arisen. Finally, I should like to explain a new 'wrinkle' in regard to immigrant visa numbers.

This administration is dedicated to finding equitable, humane solutions to the immigration and refugee problems which are facing the United States. A Select Commission on Immigration and Refugee Policy was established by the Congress in October, 1978. I am a member of the Steering Committee, which is doing the preliminary setting up work. The Commission is charged with making a study and analysis of the impact of the provisions of the Immigration and Nationality Act on social, economic and political conditions in the United States, demographic trends, present and projected unemployment in the United States and the conduct of foreign policy, among other things. A report on the Commission's findings and recommendations is to be made to the President and the Congress by September 30, 1980.

It is my personal hope that the Commission will approach its mandate in terms of considering what the United States, in the year 2000, should look like, and in terms of making policy recommendations to achieve this goal. Immigration cannot properly be assessed in the short range. The full impact of new legislation is felt much too long after the legislation is enacted. While one can see changes in the sources of immigration and the kinds of immigrants as they occur; the social, economic, environmental, and demographic effects are visible only after a period of time has elapsed. It is possible the present legislation will lead to the desired results. It may well be, however, that the Commission will recommend significant changes in the basic tenets underlying our current immigration laws in order to shape the face of future America.

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Another area with which I have been and still am involved, is the issue of undocumented workers, especially from Mexico. As you know, the United States and Mexico set up a structure in 1977 called The Consultative Mechanism to discuss bilateral concerns of the two countries and bilateral approaches to common international concerns. President Carter and Mexican President José Lopez-Portillo both feel that The Consultative Mechanism can make important contributions to policy recommendations — but only if it is improved. A number of us, on both sides of the border, have been charged with putting it in better shape. I am a member of the subcommittee on demography which is studying the implications of the large outflow of population from Mexico to the United States and the related problems posed for both countries.

Refugee matters have also been a focal point of great concern and have absorbed a fair share of my attention. While the United States has distinguished itself with its active concern for refugees, we have carried out our refugee activities through a patchwork of programs designed to respond to a particular crisis. Our current law assumes that refugee problems are extraordinary occurrences. Unfortunately, they are not. In cognizance of this, President Carter has nominated Dick Clark to the new post of U.S. Coordinator of Refugee Policy. His task is to unify all the present disparate organizations which are involved in refugee matters. As a starting point, the Refugee Act of 1979 was submitted to Congress on March 13. The Refugee Act was jointly submitted by the Departments of State, Justice, and Health, Education and Welfare. It was co-sponsored in the House by Representatives Rodino and Holtzman and introduced in the Senate by Senator Kennedy. This distinguished sponsorship bodes well for early action on the bill.

The Refugee Act hopes to accomplish four major objectives which I will describe briefly:

1) To provide a new definition of "refugee" which basically conforms to that used in the United Nations Convention and Protocol Relating to the Status of Refugees, and eliminates the geographical and ideological restrictions now applicable to conditional entrant refugees under Section 203 (a) (7) of the Immigration and Nationality Act.
2) To raise the regular refugee admissions from 17,400 to 50,000 without really increasing the overall annual immigration to the United States in recent years.
3) To provide an orderly yet flexible procedure to meet emergency refugee situations and any other situation of special concern to the United States, if the resettlement needs of the homeless people involved cannot be met within the regular 50,000 ceiling.
4) To provide for federal support for the refugee resettlement process and extend coverage to all refugees entering the United States. The Refugee

Act and the establishment of a U.S. coordinating mechanism demonstrate that a new, comprehensive approach is being applied to cope with the growing number of refugees fleeing oppression and persecution not only in Eastern Europe, Southeast Asia and the Middle East, but also in Africa and Latin America as well.

The planned work of the Select Commission and of The Consultative Mechanism, and the proposed Refugee Act, indicate that we are actively taking the initiative in finding solutions to the problems that we face now and that we will face in the years ahead.

There are two problem areas where new legislation, intended as corrective action, has raised new complications. The first concerns Section 212 (a) (32) of the INA — relating to the eligibility of foreign medical graduates to immigrate to the United States on the basis of their profession or to enter the United States to participate in educational and cultural exchange programs under which they can receive graduate medical education and training. The new standards imposed by 212 (a) (32) were an attempt to assure high quality health care to all Americans. It was the considered opinion of the sponsors of the legislation that the testing requirements for alien physicians seeking to immigrate or to participate in intern or residency exchange programs were inadequate for identifying alien physicians who were ill-trained by U.S. standards. Hence the adoption of the VQE or parts I and II of the National Board of Medical Examiners Examination, which is a more difficult examination than the one previously used. Many foreign governments have protested that the present examination is too onerous and that their students seeking further training must opt in favor of what they consider to be inferior training in other countries.

Another aspect of the new provisions which appears burdensome to foreign governments is the time restriction of two years imposed on an alien's participation in an exchange program with a possibility of an extension for no more than one year upon meeting certain conditions. Most residency and intern programs last longer than two years and the existing time frame would not allow for completion of specialty programs.

As a result of the legislative intent to provide high quality health care to all Americans, it is unlikely that the examination requirements will be modified. However, there is a possibility that the Congress would consider softening the two year limitation on program participation if it is established that the speciality training being sought is needed in the doctor's home country.

In a related development, in cooperation with the Department of Health, Education, and Welfare we have developed a proposed regulation providing guidelines for establishing that an alien doctor is of national or international renown in the field of medicine and thus not a "graduate of a medical

school". The Immigration Service will need to consider applying similar guidelines for the purpose of adjudicating applications for adjustment of status and the eligibility of alien doctors for exemption from Section 212 (a) (32) of the Act when adjudicating petitions to accord doctors third and sixth preference status.

To date, regulations adopted by the INS permit H—1 classification for doctors otherwise qualified if they are coming primarily to teach or conduct research and patient care is only an incidental part of the visit. A doctor of national and international renown would not be a graduate of a medical school within the context of Section 101 (a) (15) (H) and would not, therefore, be subject to the restrictive provisions otherwise applicable to doctors for whom H—1 nonimmigrant status is sought.

By regulation it has been determined that a designated exchange visitor program which does not include any clinical activities involving direct patient care or involve patient contact only incidentally does not fall within the restrictions of Section 212 (J) (1) if certain conditions are met. It is deemed that an exchange program which solely or principally involves observation, consultation, research or teaching is not a program in which the doctor will be receiving graduate medical education or training even if there is incidental patient contact.

For a sponsor to issue a Certificate of Eligibility for Exchange Visitor (J—1) Status to an alien doctor for such a program, the sponsor must append to it a certification that either, 1) the program does not include any clinical activities involving direct patient care; or 2) it primarily involves observation, consultation, teaching or research and any incidental patient contact will be under the direct supervision of a citizen or resident alien physician licensed to practice in that State. In the latter instance, it must also be certified that the program participant will not have final responsibility for either the diagnosis or treatment of patients, that the activities of the alien participant will conform fully with all State requirements for medical and health care professions, and that any experience gained in the program will not be creditable toward clinical requirements for medical specialty board certification. In the first circumstance, the additional certification may be made by the responsible officer of the sponsoring organization or his alternate. In the second circumstance, however, that certification must be made by the Dean of the medical school to which the alien participant is destined.

The Adoption Bill, signed into law in October, 1978, amended the Immigration and Nationality Act by removing the statutory prohibition on the approval of more than two petitions filed by the same petitioner in behalf of alien adopted children. The bill also, however, imposes the requirement that adopted children not be processed as either immediate

relative orphans or nonpreference immigrants without a valid favorably recommended home study, and without an irrevocable release for immigration and adoption. While the basic intents of the bill, to prevent family dislocations and to protect the rights of adopted children, are praiseworthy, unforseen complications have arisen, especially concerning the home study proviso.

The law places the responsibility for home studies for adopted or to-be-adopted alien children on the states of the United States. In the case of a child to be adopted in the United States, the responsible state agency in the state of proposed residence is authorized by statute to conduct a home study. If, as is often the case, the adopting parents and the child are residing abroad, it is unlikely that a state agency will have the resources to send someone abroad to conduct a home study. The regulations provide that a state agency *may* authorize organizations or individuals abroad to do home studies. However, it is not yet known if state agencies will be willing to make such arrangements or send their own representatives abroad.

In the case of children adopted abroad, the new law calls for the home study to be conducted by an agency licensed in at least one state in the United States. The agency conducting the home study must satisfy the consular officer that it is so licensed.

Difficulties arise because there may be states which do not have the legal authority to conduct or authorize home studies, or to license other agencies to do so. Other states may not have the resources to conduct home studies or the legal authority or inclination to license or authorize another agency to do so. Therefore, one unavoidable result of the new law will be that some adopting parents will encounter serious difficulties in meeting with the home study requirement.

An unfortunate and, we hope, rare side effect of the new legislation concerns the wording of Section 203 (A) (8) which prohibits the use of nonpreference immigrant visa numbers for any child other than one adopted or to be adopted who is not accompanying or following to join the natural parents. This would appear to preclude the issuance of an immigrant visa to an adopted child of parents who have qualified as nonpreference immigrants.

I have now given you a broad overview of some of the areas in which we are focusing our concerns and of two areas in which new laws, well-intended and with laudable aims, have presented unanticipated difficulties. I would now like to turn my attention to a different kind of important matter.

Although we are still six months away from the end of the Government's fiscal year, I want you to be aware of a situation which we will likely face beginning next October 1 and which will have a substantial impact on our immigrant visa operations. As you are aware, Section 202 (e) of the Act, as

added in 1976 by Public Law 94—571, provides that, if a foreign state or dependent area reaches the statutory 20,000 or 600 limit on immigration in any fiscal year, in the next following fiscal year, visa numbers allocated for natives of that foreign state have to be pro-rated among the various immigrant classes in the same percentages as are established for the overall annual limitation. This provision has been applied in several cases and has had a very substantial impact. For example, under the system prior to enactment of this provision, immigration from the Philippines was composed entirely of first, second, and third preference immigrants since demand in these three classifications was so high that the 20,000 limit for the Philippines was reached before all Philippine third preference applicants could be processed, let alone any applicants in the lower preference. Under that system, about 8,000 to 9,000 Philippine third preference numbers could be allocated before the 20,000 limitation was reached.

During the fiscal year in which Section 202 (E) was added, immigration from the Philippines was not subject to this *pro rata* division but during that year it reached the 20,000 limitation and so the *pro rata* provision was applied for FY 1978. Again in FY '78 the 20,000 limitation was reached and the *pro-rata* provision applied in FY 1979. The effect of this provision has been to restrict third preference Philippine immigration to 2,000 per year (10% of 20,000) and to allow Philippine applicants in the lower preference classes to compete for immigration.

We are now faced with the virtual certainty that the *pro-rata* provision will not apply to most oversubscribed foreign states and dependent areas in FY 1980. As you know, the preference percentages add to 100. Therefore, for the *pro-rata* provision to carry over from one year to the next, 20,000 or 600 visas must have been made available in *all* preference categories including seventh or, lacking seventh, in an appropriate amount (6%) in nonpreference. Otherwise there is no possibility of reaching 100% of the foreign state or dependent area limitation.

During most of Fiscal Year 1977, nonpreference numbers were available and they were also available during most of Fiscal Year 1978. Thus, all foreign states and dependent areas which had been oversubscribed reached the limit. This will not be true in Fiscal Year 1979 because, as you have seen, nonpreference numbers have been unavailable since the beginning of the fiscal year and, on the basis of information available to us, it is virtually certain that they will remain unavailable throughout the rest of the year. For this reason, it appears that the *pro-rata* provision will apply in 1980 only to China and Hong Kong and *not* to any other oversubscribed foreign state or dependent area. The provision will apply to China since natives of China can compete for conditional entry numbers under Section 203 (a) (7) and will likely receive approximately 1,200 such numbers, *i.e.*, the requisite

6 percent. Hong Kong born children of Chinese refugees also are documented under Section 203 (a) (7).

As a result of this situation, there will be major changes in demand patterns from the oversubscribed foreign states and dependent areas. In each case, there are one or two preference classes, in which there are major concentrations of demand. A reversion to the former system, without the *pro-rata* provision, will mean that the 20,000 or 600 limit will be reached in those concentrated preference classes and that no numbers will be available for natives of the foreign state or dependent area in lower classes. This also means, however, that there could be a seesaw effect because, under the system of satisfying the preferences in order, undoubtedly the oversubscribed states will reach their maximum in FY—80 and in FY—81 revert to the Section 202 (e) system.

To meet this problem, the Department of State is informing its consular posts abroad and is preparing revised instructions on qualifying dates to insure that there is no gap in qualified demand. We can foresee substantial complaints from applicants who might have expected to have their turns reached in the near future under the *pro-rata* allocation formula but who will be entirely cut off by the reversion to the old system.

I should like to emphasize that the Department has no choice in this matter; the law clearly calls for the system to operate in the way I have described to you. We hope that by recognizing this problem and discussing its implications now, we will be able to coordinate the major shifts that will occur to avoid a large gap in qualified demand.

The difficulties involved in implementing legislation are, I think, partially a result of our piecemeal solutions to immigration problems. We now have the opportunity, with the new initiatives that I discussed, to forge immigration policy which will take social, economic and other factors into account and perhaps even enable us to implement the intent of the Congress in a more orderly fashion.

12

Rights of Aliens to Claim Asylum

CHARLES GORDON*

DEVELOPMENT OF RIGHT TO ASYLUM IN THE U.S.

Original Rejection of Right to Asylum

IT may be a matter of some surprise to most of you to learn that the right of asylum was not recognized in United States law until quite recently. It is true that large numbers of refugees from various kinds of persecution came to this country over the years. But they came through the normal immigration channels. The doors were open and those who could, came. With the advent of numerical controls and the discriminatory 1924 National Origins law, the right of asylum became more important particularly with the rise of Nazi dictatorship in Germany. The absence of the right of asylum had a marked effect on the lives of many thousands and perhaps millions of people who were *precluded* from coming to the United States, particularly the refugees from Nazi Germany. A few trickled in but most could not come because the laws were restrictive; there was no provision for asylum; and the forces of restriction were predominant in the Congress and in the nation. The prevailing attitude affected even President Roosevelt, who doubtless was disposed to do something for them. But his hands were tied. My feeling has been that because of the restrictive laws and the absence of any provision for asylum, many thousands, perhaps millions, died who could have come to this country.

Events During and After World War II

Large Refugee Problem. The right of asylum in U.S. law had its origin during and after World War II. World War II created large numbers of refugees, and as part of its involvement in the war, the United States felt an obligation to alleviate their plight.

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UNRRA — Development of U.S. Role as Part of Settlement of World War II Problem. The first step was U.S. participation in an organization known as UNRRA, United Nations Refugee and Relief Organization. The government of the U.S. felt it had some obligation, as part of its postwar operations, to help resolve the problem of millions of people who could not or would not go back to their homeland because of fear of persecution. Therefore, the Truman administration proposed what eventually became the Displaced Persons Act of 1948. That law was enacted by Congress over determined opposition by the vigilant group of reactionaries led by Senator McCarren, whose name appears throughout the history of the more restrictive immigration laws. However, the forces of light prevailed and the U.S. finally did adopt the Displaced Persons Act which resulted in bringing 400,000 refugees to the U.S.

Refugee Relief Act of 1953. Soon, thereafter, another emergency arose when large numbers of people in Communist East Germany felt the need to escape what they regarded as persecution because of their race, religion or political opinion. Large numbers were streaming into West Germany and several other countries nearby. Again the U.S. felt that it had an obligation to do something about the plight of these people. Since the experiences of the Displaced Persons Act had not been bad, and all the dire consequences that Senator McCarren had predicted had not come about, it was not too difficult, under President Eisenhower, to get the enactment of the second major law providing for asylum, the Refugee Act of 1953. Under this law about 200,000 additional refugees came to the U.S.

Thereafter, there were some sporadic administrative and minor legislative measures, over the course of a number of years, dealing with specific refugee situations of such groups as the Hungarians, Czechoslovak, and Ugandans.

1952 Act. Section 243 (h), Withholding of Deportation of Refugees in Deportation Proceedings. The mood had changed, and the feeling was that the country ought to do something to help the plight of the refugees whose cases came up all over the world. Eventually the time came when Congress enacted the first general legislation known as the *McCarren-Walters Act.* McCarren was back. However, this time it was a generous portion of the *McCarren-Walter Act,* Section 243 (h), which still provides that the Attorney General is authorized to withhold deportation of any alien who, in his opinion, would be subject to persecution on grounds of race, religion, politics and nationality.

Thirteen years later in 1965, Congress adopted another general law relating to asylum. One of the 1965 amendments to the basic statute

provided for conditional entry of refugees from Communism.

Until now conditional entry and withholding on the grounds of persecution have been the only statutory basis for entry. However, administrative ingenuity forced us to devise some method of dealing with compelling events. The other remedy, outside the specific statute, became known as parole. As a result of this remedy large numbers of additional refugees were brought to the U.S. from Cuba, China, Uganda, Czechoslovakia, etc., as well as Jews from Soviet Russia.

Use of Parole. Section 212 (d) (5) of Immigration and Nationality Act. Original Restricted Purpose. Parole is a significant aspect of the way we deal with the refugee problem. The use of parole came about in a very interesting way. It was a device which had existed before it was recognized by statute. Administrative authorities, at least as far back as I remember, always utilized some device to let people enter this country for such emergency situations as death in the family, illness and so forth. In the 1952 law, this device was codified in the statute. Section 212 (d) (5), page 1182. But originally, the sponsors and the framers of the law had no idea that they were dealing with a device that could be used for refugees since the law was very limited in its terms. The law stated that persons could be admitted on parole for emergency reasons strictly in the public interest. And those who were the authors of the law, particularly Congressman Walter, admitted that they never thought this would be applied to large numbers of people.

Commencement of Use for Refugees. However, when the Hungarian revolt took place and large numbers of refugees fled from Hungary, the United States decided that it was time to do something to help those who were now stranded in various countries around the perimeter of Hungary. Therefore, the Immigration Service advised the President and Attorney General to use Section 212 (d) (5). They did so and thereby allowed some Hungarians to enter this country. Congressman Walter was critical of this because he had not been consulted.

Expansion of Uses in Emgergency Situations. Another emergency soon arose with the invasion of Czechoslovakia by the Russians. More refugees fled Czechoslovakia, and many were stranded in the nations surrounding it. The United States again, as a contribution to the welfare of these people, resolved to lend assistance.

When the matter was brought to the attention of Attorney General Mitchell, he felt that this law had nothing to do with refugees. With the supporting opinion of his legal advisor, now a member of the Supreme Court, he stated that this expanded use of parole was improper. However,

this outraged members of Congress and every member of the House Judiciary Committee signed a letter to the Attorney General which stated that they intended this use of parole for refugees and urged him to exercise his authority. The Attorney General agreed to do so, but he, in turn, urged that a law be passed.

Parole — A Device to Deal with Recurring Emergencies. In 1965 Congress passed a law providing for the conditional entry of refugees. Those who sponsored the law thought they were settling the issue. However, on the day that President Lyndon Johnson signed the law, he announced that he was starting to parole a large number of Cubans into the United States. The President obviously thought he had the authority to do so and exercised it. As you know, large numbers of Cubans were thereafter brought into the United States on parole.

Recently the Indo-China situation created another emergency and again the administration seized upon the use of parole.

Parole was favored by Congress, despite some occasional grumbling about lack of statutory authorization. Again the Attorney General had some reservations about the use of parole for Indo-Chinese refugees, but the Congress disregarded these reservations and proceeded to allow the use of parole.

Obviously parole has proved to be a very handy device to deal with emergencies. It is favored by the State Department in discharging foreign policy function. Group parole has resulted in bringing large numbers of refugees to the United States.

Furthermore, this is an extremely flexible device. In the first place, it has no limitation on numbers. Any number of refugees that the Attorney General feels should be paroled, can be paroled quickly. Emergencies can be dealt with as they arise. While there have been objections to the absence of a statutory definition of the authority, parole has always been used when needed. Maybe we will pass a law some day. Until then, an informal system of operations has developed. The Department of State makes a recommendation to the Attorney General stating that a people, such as those in Uganda or Indo-China, need help. The Attorney General consults the Congressional Committees and then exercises the parole authority.

U.N. REFUGEE CONVENTION AND PROTOCOL

The original U.N. Convention sought to deal only with the refugee situation arising immediately after World War II. The United States did not become party to this original convention which was not adopted until around 1951.

some years after World War II. It dealt, however, with refugees resulting from that conflict.

This Convention eventually was expanded by a Protocol, making it generally applicable to all present and future refugee situations.

Several years later, in the 1960s, the U.N. began consideration of this as a permanent charter to the U.N. Convention. Therefore, the U.N. adopted a Protocol which enlarged the coverage, removed the termination date, and extended the protection of the Protocol of the Convention to all refugees.

The U.S. became party to the Protocol in 1968, and, therefore, acceded to the Convention as modified by the Protocol. The primary purpose of the Convention and the Protocol was not to assure that any nation would receive any number of refugees. Its primary purpose was to protect the rights of refugees. In adopting the Protocol the U.S. representatives argued that it made no substantial change in U.S. law and practice. This theory has been challenged in the courts, but every court has upheld approval of the Protocol. The Board of Immigration Appeals has also approved that interpretation of the Protocol of the Convention.

KUDIRKA CASE AND ADMINISTRATIVE ASYLUM POLICY

One final element in the historical picture is the infamous *Kudirka* case. This case involved a Lithuanian seaman who tried to defect from a Russian ship. He boarded an American ship, but the commander of the boat, acting on orders from his superior, forcibly returned him to the Soviet vessel. This case created quite an uproar because Mr. Kudirka eventually proved to be an American citizen. His case embarrassed everybody and he eventually reentered the U.S. As a result, President Richard Nixon issued a directive to grant the right of asylum in order to better deal with defections. The Department of State issued a further directive setting forth criteria and procedures to be used by the agencies dealing with refugees. Under the directives of the President and the Secretary of State it is the function of the Immigration and Naturalization Service to deal with aliens at the border or within the U.S. The Service has published operation instructions, originally in Part 108 of the INS Regulations.

ASYLUM PROCEDURE

I am not going to develop the question of how one obtains a parole. That is a matter of high government policy. Individuals cannot obtain parole for the Indochinese or the Soviet Jews as a group.

The procedures for seeking political asylum have undergone considerable change. Indeed, further changes are in process as a result of constant judicial

challanges. However, I shall briefly describe the current procedure and deal with the question of asylum for people seeking entry to the U.S. or for those already here.

An asylum application for entry is submitted on Form I—189 and the applicant is interviewed by an immigration officer and given an opportunity to present his case. The decision to grant the application and admit the applicant on extended parole is made by the District Director. If he does not grant it, he must solicit the views of the Office of Refugee and Migration Affairs in the State Department (ORM) before he can render a decision. If the asylum request is submitted during an exclusion hearing, the immigration judge must postpone the hearing, and further action is deferred until the District Director reaches a decision. The immigration judge has no authority to rule on asylum request. However, a change in the regulations, recently adopted, transfers to the immigration judge in exclusion proceedings all authority to rule on asylum claims presented by entry applicants.

In any event, an applicant who claims that he would be persecuted and wishes asylum is entitled to fair consideration. I think some of you are familiar with the cases of the Haitians who have claimed asylum. Many of the procedural changes resulted from their litigations.

An asylum claim by an alien in the United States can be submitted initially to the District Director on Form I—589. The applicant is interviewed by an immigration officer and is given full opportunity to present his case. The District Director can grant the application, and in that event he grants the applicant extended voluntary departure, renewable annually. If he does not grant the application, he must solicit the views of ORM before he renders a decision. The applicant will be given employment authorization pending asylum request. If the application is denied, the asylum claim can be renewed in deportation proceedings. If an asylum claim is made during a deportation proceeding the immigration judge postpones the hearing while the claim is adjudicated by the District Director. This process is also undergoing change. Presently, this procedure is a little cumbersome and the INS is in favor of change. Due to recent changes all asylum applications by persons without status are submitted to the immigration judge in deportation proceedings. An application must be filed on the same form I—589. The form lists the applicant's background and the places for the claim of persecution. That form is considered by the District Director or one of his officers. The applicant is interviewed and then, unless the application is approved, the District Director must confer again with ORM for their opinion as to: 1) whether the government prosecutes the people; and 2) whether this specific individual would be persecuted. This opinion is only advisory. The District Director alone has the authority to make the decision for approval or denial under the present procedure.

There is a statutory right to present a claim for withholding deportation [Section 243 (h)], on the basis of anticipated persecution, whether or not an asylum request has been presented to the district director. Regulations, under consideration for some time, would require asylum claims for persons out of status to be presented only to the immigration judge.

I do not believe there is any appeal now. However, in the deportation proceedings the asylum claim can be renewed by an application under Section 243 (h) for withholding or duplication on the grounds of persecution. If it is favorable, of course, the deportation procedure is terminated; if not, the application for asylum can be renewed under Section 243 (h) and the applicant can get full review. The new procedure eliminates the duplication and requires that the asylum application be presented in a deportation proceeding before the immigration judge.

Under the present procedure the only available application must be presented under Section 243 (h). Though somewhat puzzling, this is a matter of much interest to all of us.

How does an applicant prove that he would be subject to persecution in his own country? This proof is almost impossible. However, the applicant may attempt several things. He can produce experts who testify to the conditions in his country; he can get people who can testify from their personal experiences that the persecution took place, or he can submit copies of official foreign government documents or U.S. government documents, including an annual publication of the House Foreign Relations Committee which describes the status of human rights in various countries throughout the world. The applicant can also submit newspaper accounts, that may not be weighty evidence, but which are considerable. Magazine articles and the applicant's own testimony concerning his experiences and those of his family may be presented. All these are some of the sources to be aware of and there may be others. The difficulty in all of this will continue under the new procedure. The government always refers to the Department of State which, in turn, constantly denies that persecution exists in the country of origin or that this individual will be subject to persecution. Generally the judge or the Immigration Service relies on the State Department letter though they are not bound by it. Under present regulations, when the letter is received from the Department of State it is introduced into the record. The applicant has the right to examine it, to question it and to rebut it. There is no right, however, to call the Secretary of State and his subordinates to testify about the document which they have submitted. The courts and the administrative authorities have rejected efforts to call members of the State Department to be cross-examined. Obviously, these are applications which must be considered with great care. The situation of a person who may be put to death, tortured, or suffer long imprisonment

because of his political opinion, his race or his nationality is a critical one. Therefore, this is a matter which is of concern to the immigration judges, to the Board of Immigration Appeals and certainly of critical concern to the courts.

It is true that the administrative authorities feel that many of these claims are exaggerated. They represent an effort by people who do not want to return to their countries for various reasons, perhaps unrelated to persecution. At the same time, my opinion is that the Department of State tends to avoid giving offense to governments with which the U.S. maintains friendly relations.

Our national commitments require that claims of political asylum be evaluated with the utmost care. Those who present such claims must be assured of established procedures for their consideration. Thus, a balance needs to be struck. The immigration judges, the Board of Immigration Appeals and the courts have to make this critical judgment and must do so with the utmost care to assure that the person making this claim will not be deported to a place where he will be subject to persecution.

ADJUSTMENT TO PERMANENT RESIDENCE STATUS

Regarding permanent residence for refugees, there is a hodge-podge of different laws. These laws are not well organized though remedies have been adopted from time to time.

There was a special law in 1958 which authorized adjustment status for Hungarian refugees. Another special law in 1966 authorized retroactive adjustment of status for Cuban refugees; while still another special law in 1966 again authorized adjustment status for Cuban refugees. In 1977, a special legislation authorized adjustment status for Indochinese refugees retroactively, but provided that the application must be filed before October 28, 1983, with the district director using Form I—485C.

A special provision in Section 203 (a) (7) of the law which deals with conditional entrants, states that such an entrant can have his status adjusted in a particular way after he has been in the U.S. for two years. Another part of that same law grants that a person who is a refugee in the U.S. and who has been here for two years can obtain adjusted status. Finally, the 1978 law stated that any refugee who was admitted on parole before December 30, 1980, could get retroactive adjustment status. Note that this law benefits only those admitted on parole, and not those who entered as visitors or students and became refugees in the U.S.

I want to mention briefly yet another law, Section 13 of a 1957 law allowing a form of adjustment of status. This relates to diplomats who are out of status or to persons with diplomatic status whose governments have

disassociated themselves or vice versa. People in these categories can apply for adjustment status under this special law, which allows only 50 such adjustments each year.

NEW ADMINISTRATION BILL

New legislation has been under consideration for several years, with input from various government agencies, members of Congress and voluntary agencies. I think the administration's new bill is quite good.

The purpose of the new legislation is to coordinate, clarify and give statutory sanction to the refugee policies and procedures of the United States, and the administration has done a good job of coordinating, clarifying, and assembling into one bill the legislative package which will eliminate some of the confusion and inadequacy of all the different dispensations. Furthermore, this bill has powerful Congressional support. As a matter of fact, even before the bill was introduced, Senator Edward Kennedy, Chairperson of the Judiciary Committee of the Senate, had scheduled and held hearings. The bill was introduced by Senator Kennedy, Congressman Rodino, Chairperson of the House Judiciary Committee; and Elizabeth Holtzman, Chairperson of the Immigration Subcommittee of the House.

The new legislation fixes a specific allocation of 50,000 refugees to be admitted this year. This will include the previous 7th preference allocation and approximate additional annual numbers of paroled refugees. The President is authorized, after consultation with the Judiciary Committee, to increase this allotment in any fiscal year. His finding favoring such an increase may be justified by humanitarian concern or otherwise in the national interest.

Another important feature of this legislation is that it will generally end the practice of conditional entry. Why should people be admitted conditionally when the immigration officer has gone over their qualifications very carefully before they could come to the U.S. and had found them to be qualified? Congress recognized that anomaly, and the people who are admitted to this 50,000 group will be admitted as lawful permanent residents and immediately issued their green card.

The Attorney General, under this new law, would retain his parole authority but with the injunction that it is to be used only in individual cases not in group cases such as the Ugandans, Indonesians or Cubans.

The statutory definition in Section 203 (a) (7) which limits conditional entries to refugees from Communism and the Middle East would be eliminated and would be replaced by a definition which adopts the U.N. Convention's comprehensive definition of refugees.

Provision is made for the adjustment of status of 5,000 refugees in the

U.S. This is not the present one-half of the conditional entry allocation, but rather 5,000 of the 50,000. And, as previously stated, that 50,000 number, under the new bill, can be increased by the President after consultation with the Judiciary Committee. I believe he must make such a finding before the beginning of the fiscal year.

Withholding of deportation as under Section 243 (h) is continued and retained and is also extended to exclusion proceedings, overruling the decision of the Supreme Court. This gives a quick summary of the refugee situation in the U.S.

In concluding, I have several observations. I have seen the development of these asylum policies from their inception, and my feeling is that the record of the U.S. in dealing with refugees is an honorable and commendable one. I think the U.S. has done well in discharging its responsibilities as a leader of the free world and as a nation with humanitarian concern for the plight of the refugees. Obviously, all of us can find fault with some procedure or particular aspect of the exercise of power, but my feeling is that, on the whole, the U.S. has done a remarkable job in welcoming hundreds of thousands of refugees from all parts of the world.

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Policy Perspectives On U.S. Immigration[1]

CHARLES B. KEELY*

OVER the past few years, news media have portrayed haunting pictures of Vietnamese refugees. Having set themselves adrift, refugees with no clear refuge in view, they count on their desperation to open doors to some near or distant haven. After voyages marked by hunger, attacks at sea, sickness and death, their overcrowded boats are kept at bay. These people without a country will not permit America's involvement in Southeast Asia to dissolve into memory.

Nearer to home, our strained relationship with Mexico was underscored by the panoply and seriousness of the state visit by President Carter. Mexican energy resources seem to dictate attention to a neglected and often cool relationship. One of the most agonizing items on the agenda of talks between a mineral-rich country and an energy-shy superpower is the question of illegal migrants.

These two events are symbolic of the immigration dilemma. The twentieth century continues to produce refugees like the boat people, and the potential for more refugees is great. American tradition as a haven impels us to accept them.

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[1] I realize that some would argue for retention of at least a minimal number of worker preference visas. This need should be demonstrated. I would also suggest that to retain worker preferences and to permit granting immigration status immediately it should be clear that: 1) such need requires not using the temporary labor program proposed, which includes the concept of earning or building equity by contributing to the American economy; and, 2) that retention of worker preferences precludes frustrating the goals of student, training, and exchange programs by prohibiting adjustment on the basis of akills gained from, or which were the basis for, participation in the first place. The proposals presented in this paper could accomodate retention of a reduced worker preference but would rquire some changes in the adjustment of status proposal to avoid frustration of various exchange and training programs.

But accepting them neutralizes the ability to fine-tune the calculations on population control and labor market control. Current immigration policy gives little guidance for reconciling the demands of new and old concerns regarding immigration.

Looking back over the history of immigration policy, we discover a similar dialectic between impulses to welcome newcomers and to protect the nation. Prior to 1875, the federal government had a *laissez faire* attitude toward immigration. There were no restrictions placed on the numbers and characteristics of people coming into this country. The legislative inaction at the federal level, however, played a large part in the development of nativism that loomed so large in subsequent immigration policy.

In 1875, the first federal law to exclude criminals, prostitutes and persons with various diseases and mental disabilities was enacted. In 1876, the Supreme Court ruled that the power to legislate on immigration rested exclusively with Congress and that state laws were unconstitutional. Such groups as the American Protective Association and the Immigration Restriction League were formed during this period. They served as barometers of the growing appeal of scientific racism, which twisted Darwin's theory, and of its counterpart, the Social Darwinism of Herbert Spencer, as well as an alchemist's smorgasbord of measurement techniques meant to rigorously confirm the superiority of certain groups over others. The first fruits of scientific racism in immigration were revealed in 1882 with the exclusion of an entire nationality, the Chinese. In 1907, this exclusion extended to the Japanese by way of the "Gentlemen's Agreement", and ultimately, in 1917, to all Asians. Much of this racism was intertwined with, and hidden behind, a concern for the labor force. The period from 1875 to 1920, therefore, is marked by federal action to protect health, morals, public safety and the labor force by requiring minimal individual standards, and by the exclusion of Asians, a forerunner of quota policy. But still no ceiling was placed on overall immigration. Nevertheless, an ideology of restrictions was gaining hold.

From 1920 to 1965, the national origins quota system, the monument of restrictionism based on nativism and scientific racism, was the foundation of U.S. immigration policy. Periodic challenges to the concept resulted, for example, in the granting of a small quota to China in 1943, an acknowledgement of diplomatic embarrassment since China was a wartime ally. The influx of refugees and displaced persons following World War II undermined the basis of the national origins quota system.

The McCarran-Walter Act of 1952, the first codification of immigration and nationality law, reaffirmed the quota concept even though the acceptability of racial inferiority arguments had been reduced. The concept of assimilability was used to justify favoring natives of countries with cultural and historical ties to the United States, which meant favoring the groups which had always been

favored Northern and Western Europeans. Despite nativist concerns, especially about foreign radicals and fellow travelers, the 1950s witnessed a continuation of the refugee resettlement program and a large influx of Hungarian refugees later in the decade.

The 1965, amendments to the McCarren-Walter Act mandated both a phase out of the national origins quota system by 1968, and a new preference system for distributing visas. Two innovations characterize the Immigration Law of 1965; 1) a ceiling placed on visas for immigration from the Western Hemisphere; and, 2) the labor certification requirement for those with labor preferences and nonpreference applicants.

Without going into detail about the various laws since 1965, particularly in regard to the Western Hemisphere, what has happened over the last 15 years has been a series of moves to extend the ceiling on immigration and of uniform requirements regardless of place of birth. The current situation of a single ceiling, a preference system, and a set of requirements, reflects the most recent compromises between acceptance and protection of the American immigration policy dialectic. The overall effect of these steps in the development of a worldwide policy has been a trend toward a large proportion of immigrants from southern Europe, Asia and Latin America. Current law focuses on family reunion: acceptance of a fair share of refugees; labor protection balanced against admitting persons with needed skills; and protection of the population from persons whose health, criminal activity, morality or political beliefs are perceived, or have in the past been perceived, to be a threat to public health and safety.

The movement to a worldwide immigration policy and the administration of the law since 1965 still leave an aura of unfinished business. To complicate matters, new concerns, and sometimes updated old concerns, add to feelings of incompleteness and dissatisfaction with immigration policy. Paramount among these are concerns about population growth and the impact of international migration, legal and illegal, on the labor force of this country. The ramifications of these two issues are diverse: declining natural resources; the demographic impact of growth on our cities and on population distribution; foreign policy measures and development and trade; relations with source countries of illegal migrants; and the balance of refugee resettlement programs and other national needs and goals affected by immigration.

No matter which of these issues we address, we will find many conflicting views emanating from sources as varied as Zero Population Growth, the Environmental Fund, the AFL-CIO, the American Council of Voluntary Agencies, the Mexican American Legal Defense and Education Fund, and many other interest organizations. And that is only the private sector.

I will address some of the primary issues raised by the three major competing perspectives on immigration reform: controlling population growth, adjusting immigration to labor force needs, and maintaining family reunion and refugee

resettlement. While presenting the debates which dominate these areas, I will offer a series of proposals that, as a whole, are meant to provide a legislative framework for an integrated immigration policy. Time prohibits my going into detail. Since no set of proposals can escape being controversial. I would suggest reference to the more detailed treatment in my short book, *U.S. Immigration: A Policy Analysis* (Keely, 1969).

Controlling Population Growth

The National Commission on Population Growth and the American Future noted, in 1972, that immigration accounts for about 20 percent of the overall annual growth in our population. Some commission members wanted to reduce immigration by 10 percent over five years to half its level. The majority of the commission, bolstered by a report from Princeton demographer, Ansley J. Coale, voted not to reduce immigration levels. Coale's paper (1972) addressed the question of the effects of immigration on achieving zero population growth. For his analysis, Coale assumed that immigration accounted for 400,000 net additions to the population annually. At the then current fertility rates of native and foreign born women, which have since declined, net immigration of 400,000 persons a year was compatible with zero population growth. Further emphasis is added to Coale's analysis because he neither took into account foreign born emigration from the United States estimated at about 100.000 per year in the 1960s (Warren and Peck, 1975; Keely and Kraly, 1978), nor the losses due to native born emigration.

What is missing, however, are accurate figures on the numbers of illegal migrants entering the country, on what proportion of illegal migration is seasonal or temporary workers, and on what proportion becomes permanent and uncounted additions to the U.S. population. Charles F. Westoff (1978a) has approached the problem of illegal migration and its population growth impact from another angle. He has calculated that if current fertility rates continue beyond the achievement of zero population growth, net immigration would have to be about 800,000 per year indefinitely to prevent population decline. Given that net alien immigration stands at about 265,000, and this does not take into account the impact of native emigration, illegal migration would have to add over 500,000 permanent and uncounted net additions to the U.S. population every year to prevent the United States from experiencing population decline. Despite claims, assertions, and a variety of worst case scenarios, there is no convincing data or arguments that illegal migration has contributed over half a million net, uncounted, and permanent additions to the population each and every year.

Furthermore, even if a no-growth population can be realized with current immigration levels, how long will immigration delay zero population growth, and how much larger will the no-growth population be due to immigrants and their offspring? The answer is a matter of mathematical calculation. As Westoff puts it: "Even with continued immigration of that volume (400,000 net additions), such below-replacement fertility (from current estimates of below 1.9) means that the population will stop growing in about 50 years at about 250 million and will then begin to decline" (1978b, p. 79).

One of the concerns motivating such calculations is the question of the desired ultimate size of the U.S. population. This concern addresses not only the size of the population but also the consumption patterns of Americans. According to Zero Population Growth, "On the average, each of us consumes four times as much grain and 37 times as much energy as a Filipino...". This leads to the conclusion: "There's no need for more Americans" (ZPG, 1978, p.1). ZPG is one of the few organizations to present a population target, at a specified time, incorporating immigration policy. They advocate a U.S. population of 243 million by the year 2008. Their projections show that 150,000 net additions annually from all immigration sources is compatible with this goal. ZPG supports other policy goals, like refugee resettlement, as long as it is accomodated within a policy which gives priority to the demographic criterion.

Exaggerated claims that immigration will prevent achievement of a stationary U.S. population prevent us from examining the more pertinent issues of the acceptable size of the ultimate population and a target date for achieving a stationary population. As presented, a net immigration of 400,000, given current U.S. fertility and mortality trends, will result in zero growth by around 2030 at a level of 250 million. Since current immigration and trends in fertility are compatible with zero growth, current authorized levels need not be reduced.

An issue which joins the concerns of population growth and the needs of the labor market is the issue of illegal migration. To understand the recent debates and legislative proposals on illegal migration requires attention to how the issue is perceived by many within and outside of government. It is widely assumed that illegal migration to the United States is large; is growing; is out of control; is displacing U.S. workers; is negatively affecting wages and working conditions; is producing a subclass which lacks meaningful legal protection; and that it will produce the civil rights problems and social turmoil of the coming generation. It is viewed as the result of a large labor pool in sending countries seeking better job opportunities, coupled with the desire of U.S. employers for cheap labor. How much of this is hyperbole and how much of it constitutes reality is debatable. Because of the paucity of information on illegal migrant flows into and out of this country, we are

forced to rely on estimates, and in some cases speculation, when trying to address these issues. Recent estimates by persons who are not connected with law enforcement agencies, and who do not base their work on the statistics of the Immigration and Naturalization Service conclude that the number of illegal migrants in the United States ranges at any given time from 3.5 to 5.5 million. These estimates are well below the 12 million or more that were frequently used in the mid-1970s and are still heard today. We are ignorant about what proportion constitutes permanent additions and what proportion represents circular migration. It is safe to assume, however, that even if accurate, the estimate of 3.5 million to 5.5 million does not represent permanent additions to the population.

There are those who suspect that illegal movement may not be out of control or even growing, but may be imperfectly regulated by current law enforcement practice. The most nagging issue is whether current enforcement results in numbers of workers who either fill job slots for which American workers are not available or replace U.S. workers by creating conditions that lead U.S. workers to shun particular jobs. Probably all three processes operate to some degree; fillin in, displacement, and making certain jobs undesirable by self-fulfilling prophecy. How much of each takes place and how to find out whether they take place are unanswered questions. Concern for the civil rights of migrant workers lurks in the back of every mind which approaches this problem because the potential for future problems is very clear.

Recent debate on illegal migration has centered around President Carter's proposals on undocumented aliens announced in 1977. The two major legislative thrusts of the Carter proposals are amnesty for undocumented persons in the United States and sanctions against employers who hire illegal migrants. Based on the premise that any attempt to develop a massive deportation plan was both unworkable and inhumane, the amnesty program had two components. Migrants who had entered the United States illegally before January 1, 1970, would be granted immigrant status if they met health, moral character and public charge standards. Those who had entered after January 1, 1970, but before January 1, 1977, would become a new immigration class, temporary resident aliens. The new temporary resident aliens would be permitted to work in the United States, as well as leave and reenter the country, during a five-year period. They could not bring in family members during that time and they would be ineligible for federally sponsored services such as Medicaid, Food Stamps, Aid to Families with Dependent Children, and Supplemental Security Income. No status change would apply to illegal migrants who arrive in this country after January 1, 1977.

The criticism of the Carter proposals was immediate. Some criticized the

whole concept as too lenient on law violators, who would be rewarded, while those who followed the rules might not have been able to come to the United States. The two-tiered amnesty system was criticized as arbitrary and likely to foster an administrative nightmare that would encourage fraud. The question was raised whether this system would just forbid access to programs paid for by the tax dollars of the illegal migrants.

The second thrust of the Carter proposals was to impose a civil penalty of $1,000 for each hiring of an undocumented alien, with the possibility of an injunction to force an employer to cease hiring.

The sanctions against employers were criticized as too weak. Employers could absorb the $1,000 penalty as a cost of doing business. The AFL-CIO advocated a criminal penalty for hiring illegal migrants. Ethnic advocacy and civil rights groups argued that the effect of such sanctions could be discrimination out of a genuine fear of sanctions or the use of them as an excuse for discrimination on the part of employers. It was pointed out, as well, that businesses seeking cheap labor could relocate at home or overseas, seek legislation to eliminate minimum wage coverage by age or economic sector, or just close shop. It is not at all self-evident that the effective enforcement of employee sanctions would result in a net increase of jobs for U.S. workers.

The Carter proposals were, in effect, an effort to buy time. That they fell short of guaranteeing the outcome of the policy changes they wised to enact is without debate. The President's proposals were purposely vague on what should happen to the new class of temporary resident aliens at the end of the five-year period.

Nevertheless, we have indirectly benefited from the Carter proposals. They called attention to two areas neglected in post-World War II immigration policymaking, namely the implications for the labor force and foreign policy. Failure on the part of the government to anticipate Mexico's reaction to President Carter's proposals illustrates the deep uncertainty, both within and outside government, about what interests are to predominate in relations with Mexico, in the illegal migration problem, and in immigration policy generally. Little consideration has been given to the economic impact of reducing illegal migration from Mexico with no other outlets for labor, or to the political impact of the role of illegal migration in preventing a turn to the left or to the right.

What seems most clear is a deep-felt need to assess blame, though done sometimes rather fancifully. It seems unreasonable to point to illegal migration as the source of all our labor force problems. Surely we cannot be expected to believe that unemployment rates in the United States are primarily the result of illegal migration. Given the paucity of statistics on illegal migrants, we cannot state unequivocably to what extent it contributes. The United

States should not continue such a debate as an excuse to avoid making a decision concerning our need of temporary labor.

I recommend the following: provisions for amnesty, a temporary labor program, and labor law enforcement. Any person who entered the country illegally before January 1, 1977, should be permitted to adjust status to permanent immigrant. The required residence period, plus conformity to health and other immigration criteria, would indicate a person has roots in the U.S. and the potential to integrate as a permanent immigrant. A temporary labor program should be developed to permit migrants to work in regions and sectors identified by the Department of Labor as in need of manpower. The Labor Department program could be carried out in tripartite cooperation with employers and labor unions, so that efforts to undercut the U.S. work force, or to claim an excess of available workers when none exists, could be minimized. Immigrant status might be granted to a temporary worker and his or her family, who labors in the U.S. between 15 and 25 months in any five consecutive years. In effect, the U.S. would declare its acceptance of temporary workers; and a person who worked here could build up some rights to settle. Permitting families to accompany the worker and providing access to the social benefits available to immigrants, with the exception of the right to petition for citizenship, would provide an inducement to limit the number of workers admitted under a temporary labor program.

To focus enforcement on hiring illegal migrants rather than on wages, hours, working conditions, and the right to organize is to confuse priorities. If enforcement were effectively guided by current labor law, the benefits would accrue to the total U.S. labor force and to workers who have a right to the fruits of their labor under safe conditions. Proper enforcement in this sphere would reduce the assumed extra attraction of illegal migrants to unscrupulous employers.

U.S. employment and manpower problems will not be solved by focusing on enforcement of sanctions against employers who hire undocumented aliens. Political practicality dictates acceptance of a policy against hiring illegal migrant workers. But a program to police such hiring should not be the centerpiece of law enforcement. Labor law enforcement, a full employment strategy, and manpower training, coupled with a temporary worker program as outlined, are suggested as more promising alternatives. I assume that current levels of border enforcement will continue, with such improvements as focusing enforcement efforts on areas of greatest illegal entry and authorizing seizure of vehicles used in migrant smuggling operations.

Matching Immigration to Labor Force Requirements

Most immigrants to the United States join the labor force. The claim is made, therefore, that there should be greater consideration of the manpower impact of immigration. The Secretary of Labor, Ray Marshall, has proposed integrating employment and immigration policy. The most developed approach to matching immigration to manpower needs is contained in the report on immigration prepared by David S. North and Allen LeBel for the National Commission for Manpower Policy (1978). They recommend a specific mechanism for subordinating immigration to manpower: "set immigration totals for the coming year within an arbitrary range of 300,000 to 500,000... The annual total would be based on two, totally separate, calculations. The first would be the absorptive capacity of the nation, based primarily on the unemployment rate; the other consideration would be the nation's sense of responsibility for refugees and pernaps for other overseas political considerations" (North and LeBel, 1978, p. 225). As is to be expected, organized labor supports much of the stance that emphasizes employment policy. On illegal immigration, the AFL-CIO has consistently supported criminal sanctions for employers of undocumented aliens; an employment document based on the worker's Social Security number; increased border and labor law enforcement; U.S. foreign aid geared to promoting employment in sending countries; and repeal of Tariff Code provisions that extend special customs treatment for goods produced in plants near the border and permit U.S. companies to take advantage of low-wage workers in such operations as electronics assembly and garment work. The AFL-CIO favors amnesty for illegal migrants who entered the United States before 1970, but is ambiguous about how to treat those who entered after that date.

I have already addressed many of these issues in my discussion of illegal immigrants. But I would be remiss not to point out the strong support the AFL-CIO receives from such groups as Zero Population Growth and the Environmental Fund, because these groups see the stance of organized labor as a means to controlling population growth.

On legal migration policy, organized labor continues its strong support of the goals of the Immigration Act of 1965. It is unwilling to give up the labor certification program introduced in 1965, more because of its symbolic importance in reaffirming that immigration should not harm American labor than because organized labor views it as the best mechanism to achieve that goal.

Labor certification is designed to ensure that U.S. workers are not available for the job in question and that the terms of employment meet prevailing conditions. The drawbacks to such a process are illustrated by a Government

Accounting Office study that reviewed 442 certification cases. In 191 instances the applicants were in the U.S., and 101 were already working at the job. Of the 101 at work, 42 had a non-immigrant visa that permitted them to work, while the remaining 59 were apparently visa abusers or illegal migrants (North and LeBel, 1978, p. 58).

Since labor certification is required only of some applicants, it affects less than 10 percent of recent immigrants, whereas about 52 percent of immigrants are estimated to have joined the labor force within two years of arrival.

The analysis behind support for policies which control immigration on the basis of unemployment rates is misguided and unrealistic. It overlooks the fact that it requires over one million persons to produce a one percent change in unemployment rates. It is a curiously static view of the U.S. labor force to presume that this year's unemployment rate is a practical guide to next year's employment needs from immigration. But suppose, for a moment, that the job market were static and the proposed scheme were administratively possible. Since about one-half of the immigrants enter the labor force, to vary immigration levels between 300,000 and 500,000 per year, as North and LeBel suggest, could reduce unemployment by one-tenth of one percent at most.

I propose dropping the third and sixth worker preferences entirely. Rather than trying to move toward greater subordination of immigration policy to manpower considerations or to expand labor certification procedures, I suggest eliminating current methods of manpower recruitment through immigration.

Each of these two worker preferences now reserves 10 percent of the 290,000 ceiling, or a total of 58,000 visas. About 35,000 of these could be provided for refugee resettlement, as proposed subsequently as part of a refugee policy. The remaining 23,000 would be reserved for temporary migrants permitted to adjust status after working for the appropriate time; for persons who make substantial investments creating jobs in the United States (at a figure well above the current $40,000 investment requirement); and for "new seed" immigrants, those who do not qualify for a preference and who would still be required to get labor certification.

Family Reunion and Refugee Resettlement

There are many groups who generally support current immigration policy but who seek to revamp selection procedures to maintain liberal family reunion and refugee resettlement goals. They feel there is definite need to overhaul refugee policy, specifically regarding a broader definition of refugee and the use of parole power by the Attorney General to admit refugees outside the immigration ceiling.

The major supporters of policy maintenance and procedural reform are immigrant and refugee aid groups, ethnic organizations and religious groups. Organized labor is a major supporter of parts of their program, continuing the coalition that was so important for the abolition of the quota system in the 1965 Immigration Act. Support on other issues comes from civil liberties groups, employers, and publications associated with business interests.

The core supporters of family reunion and refugee resettlement goals are the voluntary agencies that developed or expanded greatly to deal with refugee resettlement after World War II. Many of these groups style themselves as the guardians of the humanitarian tradition of American immigration, and emphasize not only the nation's responsibilities as a pacesetter on refugee policy, but also the contributions of immigrants to American life.

In contrast, supporters of controlling population growth through further restrictions on the number of immigrants or matching immigration to labor needs, see these groups as idealistic, who are unwilling to face new realities and who rely on historical sentiment to advocate continuation of an inappropriate policy. They also detect unholy alliances between business interests, voluntary agencies, and ethnic organizations advocating self-serving policies that are not in the interest of society generally and of the least protected Americans in particular.

Most objections to the family reunion policy focus on the fifth preference, that of brothers and sisters of U.S. citizens over age 21. If the purpose of the relative preference, critics argue, is the reunion of families, such a degree of kinship should not warrant a visa preference. The fifth preference is presented as the outstanding example of an entire relative preference system that not only smacks of nepotism but also seems to contain an endless snowball effect.

I would suggest, however, that family reunion should remain a cornerstone of U.S. immigration policy. Ceilings effectively control any snowball effect. The United States and our immigration laws can accomodate cultural traditions that value such kinship ties. Calling such family reunion policy nepotism is political rhetoric. Trying to pit national interests against family or individual interests as a policy framework assumes that the individual welfare of citizens and the strength of the family unit are somehow at odds with other, unspecified national goals.

On refugee policy, an acceptable solution is needed for three issues. The first is the definition of who is eligible for a preference visa as a refugee. The current immigration law limits refugee status to those fleeing from a Communist dominated country or from the Middle East. The second issue is that a person receiving a seventh preference visa as a refugee is technically not an immigrant, but a conditional entrant. He may adjust after two years

to immigrant status. This seems unnecessary since he still has to wait an additional five years to be eligible for citizenship, which involves another check. The third issue involving refugees is the most difficult. Because of the immigration law's narrow definition of a refugee, and more especially because of the lack of a refugee preference before 1965 and a present limit of 6 percent on visas for seventh preference, large numbers of refugees cannot be admitted through normal immigration channels. The parole power of the Attorney General, however, has repeatedly been invoked in refugee cases. This use of parole power was originally envisaged as an emergency measure to allow such things as medical treatment for victims of accidents at sea. Nonetheless, its use, frequently at the urging of members of Congress, to admit large numbers of Hungarians, Cubans, Indochinese, and smaller groups of victims of political persecution, has provoked uneasiness among various Attorney Generals and some members of Congress about the legality of this broad-stroke use of the parole power.

The policy problem, therefore, is to devise a refugee system that provides a reasonable definition of a refugee, that is generous enough to permit the United States to take its fair share annually of victims of war, political tyranny, or persecution; that is part of an overall immigration system; and that is flexible enough for officials to react to emergency situations, but with Congressional approval before the fact. Such a system could more easily be implemented if the UN definition of refugee or a variation of it becomes U.S. law. About 50,000 of the 290,000 visas authorized worldwide are reserved for refugees, and admissions in excess of 50,000 refugees a year require prior Congressional approval. If the decision is made to increase refugee visas to the level of 50,000 a year, funding should be on a regular and secure basis for the services that voluntary organizations, with their grassroots, community bases, perform far better than any federal agency.

If worker prefences are dropped from immigration law, the general outlines of the proposed refugee policy could be accomodated. Since some of the visas, freed by elimination of the labor preferences would be allocated to refugees, enhancement of the refugee resettlement goals could be achieved without increasing the worldwide ceiling. A bill with some of the provisions outlined above is before Congress. There are some areas of disagreement, like whether there is need for Executive discretion to admit refugees over the ceiling without prior Congressional approval. The bill is silent on the question of asylum. Although some issues remain unsettled, a consensus seems to be developing and it should be pursued, given the broad support for the American tradition of accepting victims of political repression and natural disaster.

Two other issues related to immigration policy should be briefly touched upon. The adjustment of status and the great concern with ethnic political

organization and language maintenance.

Current law permits many people to come to the United States as nonimmigrants, sometimes for extended periods. The adjustment of status mechanism is a convenient and humane way to permit someone to obtain an immigrant visa without the formality of making several trips to a U.S. consulate in a foreign country. On the other hand, the ability of those with more wealth to come to the United States to hunt for a job, or to frustrate the aims of students and exchange programs by training in the United States and then remaining, complicates the role of the adjustment procedure. The need is to retain the possibility of adjustment for the desirable reasons, while eliminating the abuses not intended by the policy.

Adjustment of status should be limited to the immediate family of citizens, to those who qualify for a family preference, or to temporary migrant workers who qualify under the program outlined earlier. In this way the humanitarian intent of the adjustment process can be maintained. The elimination of worker preferences and, therefore, of the opportunity for students, exchange visitors, and other nonimmigrants to adjust status on the basis of skills or education would both strengthen foreign student training and exchange programs, and reduce the potential of any brain drain from developing nations. A bona fide family tie, however, could result in adjustment.

Issues regarding pluralism are, of course, much more sticky. The traditional solution has been to require English language usage, particularly through language assimilation in schools. Our policy toward bilingual and bicultural education has raised the question of language maintenance, and even further, the large number of Spanish language residents raises the possibility of a bilingual nation. What seems manifest, however, is that we must reaffirm that ethnic discrimination has no place in U.S. immigration policy. Thus, the growing political power of Spanish-origin groups should not spill over into discriminatory immigration regulations reminiscent of the nativist policies embodied in the national origin quota systems.

Basically, I have proposed keeping the current limit of 290,000 visas plus the exemption for the immediate family of citizens. The preference system would keep the four family preferences, a fifth refugee preference of about 50,000, and add a sixth preference for adjustment of temporary workers who qualify in the program I outlined. These temporary worker numbers could be used in the transition of phasing out current third and sixth preference cases. Nonpreference visas, if numbers are left, could be used for investors or new seed immigrants. I would suggest that the 20,000 limit for natives of any single country be limited to family preferences and nonpreference. Therefore, refugees would be admitted regardless of place of birth, as would qualified temporary workers. The result would be that

Mexico and the Caribbean nations, which would probably supply mostly workers, could have immigration levels above 20,000.

Regarding illegal migration, I suggest amnesty, emphasis on enforcement of current labor law, and a temporary labor program. The temporary labor program would rely on a tripartite consultative mechanism of organized labor, business, and the Department of Labor. Workers who contribute to the American economy would qualify for immigrant status. However, students, trainees, and exchange program participants would not be entitled to adjustment since the purpose of these programs is not to provide a mechanism to gain immigrant status.

In making these recommendations, I am reminded of an essay written by John Kenneth Galbraith in 1949 on "The American Economy: Its Substance and Myth". I would like to paraphrase some of his comments on economic analysis to apply to immigration policy. I recommend that all proposers of immigration policy put their earnest recommendations into perspective.

No commentator on immigration policy is taken seriously unless he is a prophet of doom. " 'Do as I recommend or face ruin' is our stock argument for a policy". Usually the final "choice is between courses that are almost equally good or equally bad". We make the discovery, to the horror of the doctrinaire, that currently competing policies may work equally well or badly for that matter. Looking over the history of immigration policy and especially government action, "the triumph of practical action over confining doctrine has...been a substantial one". It is reasonable to suppose that it will rule in the future. This may not be a solvent for the present uneasiness but it is still a reassuring thought" (Galbraith, 1949).

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Administration Perspectives On The Select Commission for Immigration and Refugee Policy

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UPDATE ON ADMINISTRATION ACTIVITIES REGARDING SELECT COMMISSION

I will try to be the practical person in the area. Charles Keely always does a wonderful job of sketching the world view. I am going to talk about what I think can be done and what the status of the Commission is at this time.

Today's program calls the Select Commission for Immigration and Refugee Policy a Presidential Commission. In fact, the legislation terms it a Select Commission. I am not certain what "Select" means, but I want to emphasize the fact that this is not a Presidential Commission. In that fact lies, it seems to me, its value. It is not something which has been decided within the Executive Branch and which will be under the guidance of the Administration. Instead, it is a joint Executive Branch and Legislative Branch undertaking, and therein rests its potential. All of us who have been involved in immigration issues, both within and without the government for any period of time, can appreciate the necessity for a more sophisticated and broadly based dialogue on the directions we want to go in immigration. This Commission, a blue ribbon panel if you will, with equal participation by the Congress and by the Executive branch, is a very important vehicle for moving forward that kind of public conversation. While that is the potential, it also seems to me that the challenge is to avoid going the way of so many Commissions, which is to produce a rational, sophisticated report that gets shelved because it never really confronted the political reality of what it takes to get something done. The note that I would like to strike is this: the Commission must pay close attention to the world outside and articulate that which is politically possible, so that it can, in fact, realize its potential.

The Commission should have a strong headstart because of the work of

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the Interagency Task Force on Immigration Policy which was mandated by the President in August, 1977, to do work similar to that assigned the Commission. Its report will be available very soon. It will not be an offical document, but rather a staff report; however, it will have set forth the preliminary thinking and issue identification necessary to get a Commission started.

Now, to turn to matters similar to those Charles Keely discussed. As a representative of one of the agencies that is very interested in the outcome of the Commission, I would like to share how I think the Commission ought to proceed, substantively and logistically, because a considerable difficulty for the Commission will be choosing among the great range of issues that could be rightfully address under its mandate.

The two paramount issues, it seems to me, are the refugee issue and the issue of illegal immigration. I hope the Commission does not get too absorbed in those issues, because I do not believe that the ultimate resolution of those issues can take place within the structure of this Commission.

Concerning the refugee issue, as you know, we have legislation that we believe can pass in this Congress. If that occurs, one of the major issues which the Commission could review, and one which was an important impetus for its creation, may not exist. The important thing for the Commission to assess is the balance between refugees and other categories of immigrants. We may fail in this legislative attempt. However, the Administration is not looking to the Commission to provide answers in the refugee area at this time.

With regard to illegal immigraion, I believe Charles Keely is optimistic in his prescriptions. Because it is so topical and has been discussed to such an extent I am concerned that illegal immigration will siphon off the energies of the Commission at the cost of issues which may be resolvable. While one cannot look at immigration without looking at illegal immigration, I hope it does not become the central focus of activity.

There are a number of areas, however, that can be effectively studied and that we hope the Commission will put on its menu. These areas represent concerns we have had within the Justice Department, at least, and probably within some of the other agencies as well.

First, there is the issue of country quotas. After almost 100 years we have finally adopted a system that treats all countries equally, eliminating even favoritism between hemispheres. Yet there are strong pressures to favor certain countries once again, for different reasons. The conversation centers on favoring Mexico, because of special ties with the United States due to a common border. The argument for that type of approach will grow and there is some very persuasive evidence to support it. It deserves to be analyzed very carefully. A related question is whether countries *per se*

should be the basis for immigration numbers to the U.S. That is, should a country such as Nepal have the same opportunity to send a specified number of people to the U.S. as does Jamaica or the Philippines?

Second, the issues that Charles Keely cited regarding population and labor market needs must be examined in a hardheaded fashion. I am not convinced that immigration can be tied successfully to other public interests in this country, such as the labor market. This notion raises basic questions about social tinkering. Furthermore, the data required to produce those social indices is elusive at best. It is true that most immigrants derive eligibility from family relationships and that this serves the private interests of a few rather than a judgment about the public interest. But it may well be that this is no less rational in its effect that some other system. It is nevertheless a serious question which should be closely analyzed.

I agree with Charles Keely about the need to examine the preference system. The interagency task force report I have cited will provide new information and analysis on the preference system that has not been available to date. Examination of the preference system can be done within the time period of the Commission.

I also agree with the adjustment of status suggestion. I would begin with the proposition that we ought to prohibit and adjustment of status period. Persons are admitted to this country for specific purposes and their stay should remain consistent with those purposes. Exceptions should be few. I believe we encourage illegal immigration and overstay due in part to the ease of switching status. Another important item is the rights of aliens in this country. Court decisions offer an ambiguous picture. We have not systematically confronted the issue and it is of growing importance particularly in the area of social services.

Last, we should examine criteria for excluding entry into the U.S. One example is the security provisions of the Immigration Act. As written in 1952, the law reflects not only the values of a time that has passed but also the issues that are fundamental to our view of ourselves and the world in which we live. These issues should be aired.

Beyond that, I believe the manner in which the Commission conducts itself may be more important than the issues it treats. Research money is in the budget. There is a tremendous amount of research that should and could be done. But research takes a long time and if we put all of our eggs into that basket, it will not get us where we want to go. Some research should be done, but careful thinking about options, *i.e.*, areas in which immigration policy might go is more important. Policymakers never have sufficient information available for the decisions that are required. We must face that fact, describe where we want to go, and provide the analysis that allows for certain choices to be made.

Simultaneously, it is most important to build support for the proposals that will finally emerge. I do not see an omnibus immigration reform act of 1982 as the outcome of this effort. Such reforms are very difficult to enact. A recent precedent is comprehensive reform of the criminal laws in this country. It is needed. Ten years of effort has gone into it. It is a total package. And it has been impossible to pass. There are too many conflicting constituencies for the Congress to confront.

I see the same possibility in the immigration area. We all know that fundamental, comprehensive reform is required. But it seems to me that, if we pursue total reform, we will end up with nothing. I would rather see several discrete proposals that can be digested by Congress and for which the support has been built, then see a cosmic scheme that results in no more than material for a future Ph.D. thesis.

The Administration is very optimistic about this Commission. We are making a considerable investment of time and energy in it. Now is an important time in the process because it is a time of open bidding for issues and approaches. I have shared mine and I encourage you, individually and as a group, to offer yours.

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International Trends In Migrant Rights: The Arab Countries[1]

GEORGES DIB*

THE rights of an alien can be treated neither independently of other rights without which a person cannot acquire the status of an alien, nor independently of rights after he loses this status. The rights of an alien are but a segment in a chain of rights which begins in one's own country and ends up, although not necessarily, in one's own country, thus forming a full migration cycle.

This approach is used to emphasize the fact that international migration is a phenomena that can be dealt with only on the level of governments and that the solution of the problems ensuing from that phenomena depends on the cooperation of governments, particularly the cooperation of the governments of the sending and the recipient countries. Hence the title "International Trends in Migrant's Rights".

Having determined the approach, the next logical step is to determine the rights of the migrant. What are these rights? One simple but effective way to answer this question is to visualize the migrant's actual situation and to follow the practical steps taken in his migration. These can be summarized as follows: 1) his departure from his home country; 2) his entry into the host country or land of immigration; 3) his residence in the land of immigration and his departure therefrom; and 4) his return to his home country.

The visualization of these stages draws our attention to the fact that

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[1] This paper is based on a study submitted by the author to the Seminar on Population and Development in the ECWA Region, held in Amman 18–30 November 1978.

history has given *de facto* recognition to this process by recording communal and individual migrations since ancient times.

Today, however, international and regional legal instruments and some national constitutions have given *de jure* recognition to the stages of migration by acknowledging them as fundamental rights which everyone is entitled to exercise irrespective of sex, ethnic origin or religious belief. These rights are: 1) every person's right to leave his country; 2) every person's right to enter a country other than his home country; 3) every person's right to reside in and to leave the land of immigration; and 4) every person's right to return to his own country.

We will now examine how these rights are defined in certain international and regional legal instruments and in the constitutions of some Arab States.

THE CITIZEN'S RIGHT TO MIGRATE

In International Legal Instruments

The second clause of Article 13 of the Universal Declaration of Human Rights[2] stipulates as follows:

> "Everyone has the right to leave any country, including his own, and to return to his country".

The International Covenant on Civil and Political Rights[3] confirms this right but not in the absolute form mentioned above. Article 12 of this Convention states that "Everyone shall be free to leave any country, including his own" (clause 2), and that the above mentioned right "shall not be subject to any restrictions except those which are provided by law and are necessary to protect national security, public order, public health or morals or the rights and freedom of others" (clause 3), and that "no one shall be arbitrarily deprived of his right to enter his own country" (clause 4).

In these texts restrictions are clear and can be applied objectively. For instance, in the case of a citizen who is a carrier of an infectious disease ascertained by a doctor, the state is not only entitled to prevent him from leaving the country but is also duty bound to do so. Certain other restrictions, especially in connection with national security and public

[2] The General Assembly of the United Nations endorsed this Declaration on 10 December 1948.

[3] The Third Committee of the General Assembly of the United Nations endorsed this Covenant on 17 December 1959.

order, are vague and open to more than one interpretation. These two restrictions may be applied on a wide or a narrow scale depending on the existing political regime. A political regime may extend its interpretation of "national security" to include not only the citizen's political activity but also his economic, cultural and social activities, so that each of these activities becomes essential for the preservation of national security. The same thing applies to the term "public order".

Attempts in some parts of the world, particularly in Western Europe, to impose restrictions on the extended interpretation of the terms "national security" and "public order", have had some success. But, unfortunately, in the Arab countries, no such attempts have been made. In fact, attempts have been made to include in the legal texts an extended interpretation of these two terms, especially legal texts which are related to migration and the status of aliens. For example, the Egyptian law No. 89 of 1960 relevant to the entry, residence and departure of aliens, which stipulates in Article 25 that an alien is liable to expulsion if his presence on Egyptian territory constitutes a threat "to the security of the state, internally, externally and economically, etc...",

In 1948, the Lebanese Government submitted to the Parliament for approval a law regulating the issuing of passports to Lebanese who wish to leave the country. Article 10 of that project of law gave discretionary power to the Director of the *Surete Generale* to refuse to issue a passport to any Lebanese who wished to leave the country, if, in the opinion of the Director, his leaving constituted a threat to national security. Further, the Director was also given the discretionary power to prevent any Lebanese from leaving the country on the same grounds even though he was holding a valid passport. The Lebanese Parliament voted upon this law article by article, and it unanimously refused Article 10 just mentioned and substituted instead, the following text:

> Everyone is entitled to a passport within a period not exceeding five days from the day the request for a passport is submitted.[4]

Unfortunately, the Government defied the unanimous vote of the representatives of the people, reintroduced a modification to Article 10 as approved by parliament and submitted it again to parliament for approval. The modification reinstated Article 10 as was originally submitted by the Government, and added the establishment of a committee headed by the Director of the *Surete Generale* and composed of five officers, three from the *Surete Generale*, and two from the army. This committee was given the power to decide, by majority, all referred cases of Lebanese who were denied a passport or prevented from leaving. One asks the question:

[4] Official Gazette No. 37, May 6, 1968.

referred by whom? Of course, by the Director of the *Surete Generale*. Obviously, the committee does not introduce a substantial change in the law since three of its members are subordinates to the Director of the *Surete Generale*. The Parliament voted in favor of this modification,[5] and thus, the two concepts of national security and public order were reinstated after they had been waived for a period of only two days.

These two examples are sufficient to precipitate the question; how can we conclude that the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights have established and guaranteed the citizen's right to leave his country, if these two documents have, at the same time, accorded the state the right to prevent certain of its citizens from leaving the country on the grounds that their departure would pose a threat to national security and public order?

In effect, the restrictions stipulated in Article 12 of the Covenant on Civil and Political Rights are intended to be applied in exceptional circumstances and unusual conditions. In normal circumstances and natural conditions the citizen's right to migrate is guaranteed in these two documents.

Other questions which come to mind are: to what extent do these two documents guarantee the citizen's right to emigrate from his country? Is the state obliged to observe the rights specified in the Universal Declaration on Human Rights and the Covenant on Civil and Political Rights?

One school of thought believes that states are legally bound to observe these rights on the basis that they are implicitly acknowledged in the Charter of the United Nations.[6] Since the Member States of the United Nations are legally bound to adhere to the terms of the Charter, these states are also legally bound to observe these rights. The followers of this school of thought base their argument on the fact that the invitation to Member States of the United Nations to strengthen their cooperation and promote and encourage human rights and fundamental freedoms is repeated several times in the Charter.[7]

There is another school of thought, however, which may be more prevalent since it is closer to reality, i.e., the practice of states. This school of thought holds that a distinction must be made between the Charter of the United Nations insofar as it refers to human rights and fundamental freedoms on the one hand, and the international covenants which define these rights and freedoms on the other. The Charter mentions only the principle of rights and freedoms, and the commitment of Member States of the United Nations to this principle is totally distinct from the form in

[5] Official Gazette No. 38, May 9, 1968.

[6] "International Law", Appenheim and Lautepacht, Vol. 1, 8th edition, p. 743.

[7] This invitation is made in the Preamble of the Charter and in Articles 1, 55, 62, 76.

which these states agreed to define this principle. This is clear from the fact that the states which endorsed the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights only endorsed them as recommendations and not as binding resolutions.

It is easy, therefore, to understand how it can be deduced erroneously that the fundamental human rights, including the right to leave one's own country, are not guaranteed since the states which signed the international covenants containing these rights are not bound to observe them, and consequently, these covenants are of no value.

We are opposed to this view and consider that these covenants are of great value since their endorsement means that the signatory states have agreed to be morally committed to at least two obligations, namely: 1) the obligation to revoke or modify existing legislation inconsistent with fundamental human rights as stipulated in the Declaration of Human Rights and the International Covenant on Civil and Political Rights which include the citizen's right to leave his country; and 2) the obligation to refrain from promulgating new legislation inconsistent with these rights.

This is as far as international covenants have gone in guaranteeing the right of individuals to leave their country.

All of the above shows that there is a missing link between these international legal instruments on the one hand, and the commitment to grant this right to each citizen on the other hand. This missing link can be filled only through the conclusion of bilateral or miltilateral agreements among states, or through the passage of internal legislation in each country to guarantee the right of its citizens to migrate.

In Regional Legal Instruments

One of the principle regional legal instruments the signatories of which have committed themselves to granting their citizens the right to migrate, is the European Convention on Human Rights of November, 1950, for the countries of Western Europe. The text in this Convention incorporating the right of every person to leave and return to his country was dra n up in the same manner as the corresponding article in the Universal Declaration of Human Rights.

Paragraph 2 of Article 22 of the American Convention on Human Rights is similarly phrased except that this Convention goes beyond the affirmation of the right of every citizen to leave and return to his country, since paragraph 6 of the same Article 22, stipulates as follows:

An alien lawfully in the territory of a state party to this Convention

may be expelled from it only pursuant to a decision reached in accordance with law.

Moving from the American to the African continent we see that the Charter of the Organization of African Unity, signed by the African States in Addis Ababa on May 23, 1963, gives indirect recognition to the right of citizens of Member States of the Organization to leave and return to their countries. It is stated in the preamble to this Charter that the Organization of African Unity declares its persuasion that "the Universal Declaration of Human Rights, to the principles of which we affirm our adherence, provides a solid foundation for peaceful and positive cooperation among states". Hence, the Member States of the organization acknowledge their adherence to paragraph 2 of Article 13 of the aforementioned Declaration.

In contrast to this vague recognition of the citizen's right to migrate, the Charter of the *"Union Africaine et Malgache"* (U.A.M.), which was signed at Tananarive in Madagascar on September 12, 1961, includes a clear and explicit recognition of this right. Article 2 of this Charter stipulates as follows:

> Natives of contracting States may freely enter the territory of anyone of the other parties, travel in that territory, establish residence there, and depart at any time within the framework of the laws and regulations applicable to natives of that territory without prejudice to the laws concerning public order and safety.

This clear recognition of the freedom of migration not only acknowledges the principles laid down in the American Convention on Human Rights but also frames it in the same style as the corresponding articles of the Treaty of Rome of March, 1957, which established the European Economic Community providing for freedom of movement of workers, and the corresponding article in the Treaty of Paris establishing the European Coal and Steel Community.

When one comes to the Arab countries, one is faced with the Pact of the Arab League.[8] The Pact of the League of Arab States takes its inspiration from the general Arab belief in, and desire for, the achievement of Arab unity as stated in the preamble. In response to this general Arab belief, the Arab States drew up a Pact for a League aimed at (Article 2):

> "...close cooperation among Member States, with due regard for the systems and circumstances of each state, in the following spheres:
>
> 1) economic and financial affairs;

[8] The Pact of the League of Arab States was signed in March, 1945 in Cairo by all the Arab States which were independent at that time, namely: Egypt, Iraq, Jordan (Transjordan), Lebanon, Saudi Arabia, Syria and Yemen. The membership of the League now includes all 21 Arab countries plus the Palestinian Liberation Organization (PLO).

2) communications affairs;

3) cultural affairs;

4) nationality; passport and visa affairs, implementation of court orders and the extradition of criminals.

5) social affairs; and

6) health affairs".

The recognition of Arab unity in the Charter of the League of Arab States and the efforts to achieve this unity in the above mentioned form make it possible to say that this Charter implicitly recognizes the right of Arab nationals to freedom of movement among the Arab states since the freedom of movement of individuals is a prerequisite for this unity, and without it such unity could not be visualized.

In effect, since its establishment in 1945 the League of Arab States has made considerable headway in its clear recognition of the right of Arab nationals to freedom of movement, residence and work in the Arab world.

On June 3, 1957, the Economic Council of the League[9] endorsed the Agreement on Economic Unity among the members of the League; Article 1 stipulates the following:

> Full economic unity shall be established among the members of the Arab League which shall, in particular, guarantee to these states and their subjects on an equal basis, freedom of movement of persons and capital...and freedom of residence, work and employment.

However, this clear recognition of the individual's freedom of movement, residence, work and employment will remain incomplete unless internal legislation is promulgated to implement it. What is this legislation in the case of some of the Arab Countries?

In the Constitutions of Certain Arab States

The constitution of the Arab Republic of Egypt promulgated on September 11, 1971 is very explicit in this regard. Article 51 stipulates as follows:

> "No citizen may be expelled from the country or prevented from returning thereto".

Article 52 adds that:

> Citizens shall have the right to emigrate permanently or temporarily. This right, together with the procedures and conditions for emigration and leaving the country shall be regulated by law.

[9] The Economic Council was established under Article 8 of the Joint Defense and Economic Cooperation Treaty among the Member States of the Arab League which was ratified by the League Council on April 13, 1950.

Paragraph one of Article 33 of the 1973 Constitution of the Syrian Arab Republic stresses that: "the citizen may not be expelled from the territory of his homeland".

The Constitution of the Hashemite Kingdom of Jordan promulgated in 1952 also includes the following stipulation in paragraph one of Article 9: "No Jordanian may be expelled from the territory of the Kingdom".

Article 28 of the 1962 Constitution of the State of Kuwait stipulates that: "No Kuwaiti may be expelled from or prevented from returning to Kuwait".

This article of the Kuwaiti Constitution corresponds to Article 37 of the 1971 temporary Constitution of the United Arab Emirates which stipulates as follows: "Citizens may not be expelled or exiled from the Union".

Three observations should be made on these texts.

First, with the exception of the Egyptian Constitution, all of the previously mentioned constitutions are completely silent regarding the right of the citizens of these countries to leave their homeland. This phenomena can be explained in two ways. Either these countries consider that the right of their nationals to leave their country is taken for granted and, consequently, they see no need to mention this right in the constitution, or these states regard the written acknowledgement of this right in the constitution as a threat to the national security of the State in its broad sense, *i.e.*, from the political, economic, cultural and social standpoint, bearing in mind that we assume in all cases that the citizen has not committed a crime or a felony and that he has always been law abiding.

Which of these two interpretations is more realistic?

The absence of constitutional or legal provisions granting the citizen the right to leave his country obviously does not necessarily mean the absence or denial of such a right.

Furthermore, all of the Arab States are Members of the United Nations and, therefore, are all parties to the Universal Declaration of Human Rights. These States are morally bound to grant this right to their citizens.

All of this means that, in normal circumstances and natural conditions, the citizen has a right to leave his country in spite of the absence of a constitutional or a legal provision to this effect.

In exceptional cases and unnatural conditions the state may impose restrictions and prevent its nationals from leaving the country on the grounds that their departure would constitute a threat to national security, public order, public morals or the freedom and rights of others.

In effect, citizens are obliged to obtain a passport or other travel documents in order to leave their country. If the existing political regime with a state holds to a broader interpretation of the restrictions imposed on the right of nationals to leave a country, and strictly applies such restrictions

even in normal circumstances, then this means that this right has become a privilege which a regime may grant or refuse to its nationals as it wishes, by either granting or refusing passports or travel documents to applicants.

In the absence of a constitutional or legal provision guaranteeing the citizen's right to leave his country, this right becomes revocable and subject to change depending on time and place, since the attitude a political regime might adopt towards this right in a particular country may often change between a right and a privilege.

Secondly, the provision made in the Egyptian constitution regarding the citizen's right to migrate permanently or temporarily is worded vaguely and requires considerable qualification. As it stands, this provision seems to include Egyptian nationals wishing to leave and work abroad. Therefore, the Egyptian's departure from his country to work abroad is more dependent on his prior acquisition of a work permit in the country of destination, as is required under the internal laws of most countries, than on the Egyptian national's exercise of his right to leave.

Thirdly, the above mentioned constitutions guarantee the citizen's right to return to his homeland either by a clear provision, as in the case of the Egyptian and Kuwaiti constitutions, or by an implicit provision, as in the case of the constitution of Jordan, the Syrian Arab Republic and the United Arab Emirates which merely states that citizens may not be expelled from their country. This legally implies the citizen's right to return to his country.

ENTRY INTO, RESIDENCE IN, AND DEPARTURE OF CITIZENS FROM HOST COUNTRIES

Entry of Citizens Into Countries Other Than Their Own

In public international law there is no legal principle obliging states to accept non-nationals into their territory with the exception of diplomats, employees of international bodies and refugees from disaster areas. The admission of aliens into the territory of a state is subject to every state's right to self-preservation on the one hand, and its duty to protect aliens entering its territory on the other.

Thus, the state has the right to forbid the entry of persons who would pose a threat to its safety and security, or who are carriers of infectious diseases, or who are incapable of work, if the state's circumstances do not

permit it to improve their situations. And, since there is no right without a corresponding duty, it is the corresponding duty of the state, once it accepts an alien into its territory, to recognize in its laws the intrinsic rights which are necessary for aliens to attain a life of stability and well-being. In other words, when a state exercises its right to admit an alien into its territory, it is binding itself with the duty to observe the rights intrinsic to his person.

What are these rights? As amplified in the Charter of the United Nations and the Universal Declaration of Human Rights, they are the following:

A) The right of the alien to recognition as a person before the law.

B) 1. His right to reside in the territory of the state.

2. His right to departure from the territory of the state.

C) 1. His right to personal freedom including the inviolability of his person, his domicile, his correspondence and communications, and the right to move freely internally, subject to areas restricted by the state, and externally.

2. His right to freedom of thought.

3. His right to establish a family.

4. His right to association.

D) 1. His right to enter into transactions.

2. His right to work.

3. His right to own, inherit, and bequeath property.

E) His right to use public facilities like schools and hospitals.

F) His right to facilities to acquire the nationality of the state when he or she fulfills the requirements prescribed by the law for natualization, (addition of the author).

Time does not permit an extensive treatment of all of these rights in international and regional legal instruments and in the internal legislation of some countries. A selection is necessary. Therefore, I will examine some of these rights in the internal legislation of some Arab countries.

Residence and Departure of Aliens

In Lebanon, the Law of July 10, 1962 regulates the residence of aliens (Articles 8—12). It provides the following: 1) the *Surete Generale Directorate* may issue aliens wishing to stay in Lebanon for one year or more annual residence cards or permanent resident cards valid for three years and open to renewal; and 2) the Lebanese law adds that aliens residing in Lebanon are prohibited from engaging in any occupation or profession unless they

obtain a permit from the Ministry of Labour and Social Affairs. Entertainers are exempted from this provision by Article 25.

In Jordan, law No. 24 of 1973, regulates the entry, residence and departure of aliens and makes the following stipulations:

Aliens residing or wishing to remain in the Kingdom are required to obtain a residence permit (Article 18). This permit is valid for one year, renewable. The Minister of the Interior, on the proposal of the Director of the Ministry, may grant a five year residence permit to any alien who has legally lived in the Kingdom for ten years (Article 22).

Aliens may only obtain residence permits within the terms provided by the law, Article 26 of the law in question stipulates that: "An alien may be granted a residence permit when the authorities are convinced that the reasons for doing so are justified. To be granted a permit, the applicant must satisfy one of the following conditions: a) the alien has a work contract with a registered company or commercial firm or with a recognized business in the Kingdom, provided he does not compete with Jordanians in their work and that he can establish this with an attestation from the Ministry of Social Affairs or another competent authority; b) the alien has a secure and legitimate source of livelihood inside or outside the country for the duration of his stay and he can establish this with a certified and official attestation; c) the alien's purpose is to invest capital in commercial or industrial projects approved by the Ministry of National Economy; d) the alien has a scientific or professional qualification of a type that is not available in the Kingdom, and he can establish this with the written attestation of officially recognized institutions and obtain the approval of the competent Jordanian authorities; e) the alien is an employee or worker at a diplomatic or consular mission in the Kingdom and his country accords Jordanians reciprocity; f) the alien is an elderly person or a minor whose only relations are resident in the Kingdom; and g) the alien is a student enrolled at a Jordanian institution".

Article 27 provides that in addition to these conditions the Minister of the Interior may require that the alien "submit a financial guarantee as security against any obligations he may incur and against his commitment to leave the country as soon as his residence permit expires". The Ministry is authorized to expropriate this guarantee when any of its provisions are infringed (Article 38).

The law also requires the children of a resident alien who attain the age of 16 years to apply for separate residence permits in accordance with the conditions cited above (Article 25).

The law requires aliens to surrender their residence permits and other documents to the Directorate of the Ministry of the Interior or to one of its branches when leaving the country temporarily or permanently. Any alien

who returns to the Kingdom before his residence permit expires may have it reissued to him provided his absence from the country did not exceed six months (Article 9).

In Kuwait, Amiral Decree 17 of 1959, as amended by Law 1 of 1963, regulates the residence of aliens. It requires all aliens who wish to reside in the country to obtain a permit from the Minister of the Interior (Article 9).

Ordinary residence permits are granted for five year periods to aliens wishing to reside in Kuwait. The resident alien must leave the country when this period is over unless he requests and obtains the renewal of his permit at least one month before its expiration. Resident aliens must notify the Nationality and Passports Department of every trip abroad and every change of address. They may not be absent from the country for periods in excess of six months without obtaining the approval of the Minister of the Interior before departure; otherwise they forfeit their residence status (Article 12).

On October 1, 1965, the Minister of the Interior issued Ministerial Decree 10 of 1965. This decree contains the provisions for enforcing the country's residence law cited above. Articles 11 and 13 of this decree provide that "applicants for temporary residence are required to reveal their sources of financial support for the duration of their residence, whether the sources are the applicant's own funds or those of another Kuwaiti resident.

Aliens residing temporarily in Kuwait for health care or school examinations need only present a statement from the Kuwaiti institution in question. Those obtaining temporary residence permits are not permitted to engage in remunerative activities in the country".

Article 13 stipulates that: "if the applicant for an ordinary residence permit does not intend to work during his stay, he is obliged to indicate his sources of support for the period he wishes to reside in the country, and he must repeat this every time he renews his application. The Minister of the Interior may, when he deems it appropriate, exempt particular individuals from this obligation. Aliens with non-working resident permits may not engage in remunerative employment in the country with the approval of the Minister of the Interior".

In Lebanon, the law of July 10, 1962, regulates the departure and deportation of aliens (Articles 15—18). These articles stipulate that the *Directorate* of *Surete Generale* may, in the interest of state security, require aliens to obtain an exit visa; that it is forbidden to leave the country except at authorized Public Security posts; and that the Director of *Surete Generale*, with the approval of the Public Prosecutor, may detain any person against whom a deportation order has been issued pending deportation procedures (Article 15, 16, and 18). Article 17 states that an alien whose presence is detrimental to public peace and security may be deported by a decision of

the *Directorate* of *Surete Generale*. Deportation takes place either by notifying the person in question that he must leave Lebanon within a period fixed by the Director of *Surete Generale* or by instructing the *Surete Generale* forces to escort him to the frontier.

The deportation of aliens from Lebanon is a matter left to the sole discretion of the Director of *Surete Generale*. In other words, deportation takes place through administrative action.

In Jordan, too, aliens are deported by administrative action, Article 19 of law 24 of 1973 states that "the Minister (of the Interior) may, after consulting the Director, approve or reject the residence application of any alien, cancel any residence permit granted, and order any alien to leave the kingdom with no explanation".

The Minister of the Interior, may, upon the proposal of the Director, deport any alien. He is also authorized to detain temporarily anyone whose deportation has been ordered, pending deportation procedures. No one who has been deported may reenter the Kingdom without the specific authorization of the Minister (Article 37).

Proceeding from the question of deportation to that of voluntary departure of aliens from the Kingdom, it was previously indicated that the law requires aliens to surrender their residence and other permits to the authorities. They may have them restituted upon their return to the country provided that their absence did not exceed the six months period provided by law.

In Kuwait, both departure and deportation are governed by the regulation that stipulates that aliens are required to notify the Nationality and Passports Department of every trip abroad and that they may not stay away from the country for periods in excess of six months.

The Kuwaiti law, Amiral Decree 17 of 1959, as amended by law 1 of 1963, is interesting in that it distinguishes between "deportation" and "expulsion". Article 20 states that any alien may be deported from Kuwait by a decision of the Minister of the Interior if he does not have a residence permit or if the period of its validity has expired. In such case, the deported alien is entitled to return to Kuwait as long as he satisfies normal entry requirements.

Aliens who are *expelled*, however, may not return to Kuwait without the specific authorization of the Minister of the Interior (Article 19).

The two measures are comparable in that they are both enforced by administrative action. They differ, however, in terms of their consequences. Deported aliens have the right to re-enter Kuwait by satisfying the normal conditions of entry, while aliens who are expelled may not return to Kuwait without the special authorization of the Minister of the Interior.

The Minister of the Interior is authorized to issue a written decree expelling any alien, even one who possesses a valid residence permit, in the

following circumstances (Article 16); a) when a court orders his expulsion as part of a judgment against him; b) when the alien has no apparent source of livelihood; and c) when the Minister of the Interior judges that the expulsion of an alien is required by the public interest, public security or public morals.

Expulsion orders may include the dependent members of the alien's family (Article 17).

The Minister of the Interior is authorized to issue an order detaining an alien whose expulsion has been decided, for a period not to exceed two weeks, provided that his detention is necessary to the enforcement of the expulsion order (Article 18). Aliens who are to be deported or expelled may be granted a period not to exceed three months to arrange their affairs, should they have any (Article 22).

THE ALIEN'S RIGHT TO WORK

Lebanon

Decree 17561 of September 18, 1964, regulates the right of aliens to work in Lebanon. The decree stipulates that any alien who wishes to enter Lebanon in order to practice a profession or occupation, remunerated or unremunerated must obtain the advance approval of the Ministry of Labour and Social Affairs, with the exception of entertainers, who must obtain the approval of the *Directorate* of *Surete Generale* (Article 2).

Aliens abroad submit their applications for advance approval to the Ministry of Labour and Social Affairs through Lebanese missions or through their own authorized agents in Lebanon. Applications must contain comprehensive information on the applicant's experience and capabilities and his engagement that approval shall not embrace any member of the applicant's family (Articles 3 and 4).

When the applicant is a wage-earner, his employer is required to submit a petition to the Ministry of Labour and Social Affairs declaring his willingness to hire him. He is required to attach thereto: 1) photocopies of all the documents that support the information on the alien's application; and 2) a copy of the alien's work contract, notarized in Lebanon or at a Lebanese diplomatic mission abroad. Aliens wishing to engage in private business or to act as company representatives must submit to the Ministry of Labour and Social Affairs through Lebanese missions abroad or through their authorized agent in Lebanon, photocopies of all the documents supporting their applications. They are also required to specify any possibility of employing Lebanese labor (Article 5).

An alien who obtains advance approval to work in Lebanon is required to submit to the Ministry of Labour and Social Affairs a request for a work permit within ten days of his entry into the country. The Ministry has the right to rescind its advance approval when an applicant fails to appear in Lebanon within three months of the date on which the approval was dispatched. Barring any *force majeure*, an advance approval shall be considered null and void if the applicant fails to exchange it for a work permit within the ten-day period fixed by law (Article 6).

Without prejudice to the principle of preference to Lebanese citizens, any alien — whether residing on Lebanese soil or applying for entry into Lebanon — may be granted a work permit and his permit may be renewed, if he can meet one of the following conditions (Article 8); 1) he is a specialist or expert whose work cannot be performed by a Lebanese citizen; 2) he was a resident of Lebanon prior to 1954 and has worked uninterruptedly in an establishment in Lebanon for at least 9 months a year; 3) he has been married to a Lebanese citizen for at least one year; 4) he was born of a Lebanese mother or is of Lebanese origin; 5) he is a director of a foreign company, a head accountant or assistant to the director — where the company has branches in Lebanon or is active in the Middle East; 6) he is the representative of a foreign company; and 7) he is an entrepreneur, craftsman, professional or technician who also fulfills the following conditions: (a) he was a Lebanese resident prior to 1954 and initiated his activity before January 1, 1960; (b) he entered Lebanon after January 1, 1960, his capital is at least L.L. 50,000 and he employs at least three Lebanese citizens.

Work permit applications are submitted to the Alien Labour Control Department of the Ministry of Labour and Social Affairs.

This department recommends approval or rejection, but the Director General of the Ministry makes the final decision (Article 11).

Permits are granted and renewed for a maximum period of two years from the date of issue (Article 14). Persons who have received advance approval or a work permit may not transfer to another institution or change their type of work without the prior approval of the Ministry of Labour and Social Affairs (Article 15).

Work permits may be rescinded whenever false documents are uncovered and whenever the interests of the Lebanese labour force dictate it. This often happens in the following circumstances: 1) when an institution fires a Lebanese employee and retains a foreign employee equal in qualification and requirements; 2) when a company fails to give preference to a Lebanese citizen who posseses the required qualifications; 3) when a company fails to fulfill its commitment to train Lebanese citizens in the work being performed by foreign employees; 4) when an alien violates the terms of his advance

approval or work permit; and 5) when an alien is convicted of a felony or a dishonorable crime.

It is well known that Lebanon practices a free market employment policy. Accordingly, employment agencies engaged in securing jobs for Lebanese and aliens in Lebanon and abroad proliferate in the country.

The Lebanese Government attempted to put a limit to this uncontrolled proliferation. On July 13, 1971, the Ministry of Labour and Social Affairs issued decree 375/1 which defines the terms under which employment agencies may be established and it regulates their activities. This decision provides the following:

> Agencies that are engaged in securing paid employment for Lebanese and aliens wishing to work in Lebanon or abroad shall be called private employment agencies. These agencies, including those that offer their services gratuitously shall be licensed by the Ministry of Labour and Social Affairs.

Private employment agencies played a major role in facilitating the emigration of Lebanese technical and non-technical manpower. Following the two year war, the Lebanese Government saw that it needed this manpower for the reconstruction of the country. In order to stem the tide of emigration, therefore, it sought to close private employment agencies and replace them with a national employment body through which it could better control emigration.

Accordingly, on June 27, 1977, the Government issued Legislative Decree 80 in which it established the National Employment Organization as a public agency charged with the general implementation of Lebanon's employment policy. It was assigned more specifically with the following responsibilities: 1) establishing employment offices in Beirut and the provinces; 2) combatting unemployment by promoting a high rate of employment; 3) contributing to the improved organization of the labor market; 4) contributing to the promotion of projects having a positive impact on the labor market; 5) participating in any activity that raises manpower standards; and, 6) conducting studies and research aimed at the formulation of a comprehensive employment policy for the country. This decree also provides that:

> No license shall be granted to private employment agencies engaged in activities within the competence of the National Employment Organization; no license previously issued shall be renewed or amended, no diversification based on an existing license shall be approved and no license may be passed on through will or inheritance.

Jordan

The alien's right to work in Jordan is governed by the following provisions:

Article 16 of law 24 of 1973 prohibits all Jordanian persons, companies and organizations from employing any alien, with the exception of technicians whose period of employment does not exceed three months, unless he obtains a resident permit.

The first requirement for aliens who wish to work in Jordan, then, is the possession of a resident permit.

Labour law 21 of 1960, as amended by law 2 of 1965 and law 25 of 1972, adds another requirement: aliens must obtain a work permit from the Minister of Social Affairs and Labour or his delegate. This is specified in Article 7 which regulates alien labor in the Kingdom. Article 7 stipulates as follows:

A) Employers may engage a foreign worker only if the alien possesses needed experience and ability which cannot be found among Jordanian workers and provided that:
   1. Priority is given to Arab technicians and experts over their foreign counterparts.
   2. A work permit is obtained from the Minister of Social Affairs and Labour or his delegate before the work begins.

B) Aliens working in the Kingdom when this law comes into effect may finish the period of their contracts; but they may not renew their contracts or continue to work unless they fulfill the requirements provided in the preceding item.

C) Without prejudice to the provisions of item "A" of this paragraph the Minister of Social Affairs and Labour may, after consultation with the Minister of National Economy, authorize aliens to work in the Kingdom if their employment is likely to be of benefit to the national income.

To recapitulate Article 7, aliens who have obtained a residence permit on the basis of a work contract prior to the promulgation of this law are entitled to complete the period of their contracts; but the renewal of their contracts and their authorization to continue in their work will not be subject to the following conditions: 1) priority to Arab technicians and experts; and 2) a work permit from the Minister of Social Affairs and Labour.

Thus, to work in Jordan, an alien is required to obtain a residence permit and he must submit to the principle of priority to equally qualified Arab citizens. When the employment of a specified alien, Arab or non-Arab, is seen to be of value to the national income, however, the Minister of Social Affairs may, without prejudice to the above considerations and following

consultation with the Minister of National Economy, decide to grant him work authorizaton.

Kuwait

Kuwait is a major center of attraction for workers from the Arab countries and from the region as a whole. Thus the legal provisions governing foreign workers in this country is comprehensive and detailed. The preceding section described the legal provisions governing the entry into Kuwait of aliens whose purpose is transit or visiting, or whose purpose is temporary or permanent residence without the intention to work in the country.

At this point the legal provisions governing the entry of aliens into Kuwait for the purpose of work and the status of aliens already in Kuwait who wish to work will be described. These questions are regulated by Ministerial Decree 10 of 1965, which was issued by the Minister of the Interior as the executory instrument of the alien resident law.

Any alien coming to Kuwait for the purpose of working with a person or company in the country is required to present a "no objection certificate" from the Ministry of Social Affairs and Labour to the passport control officer at the point of entry.

"No objection" certificates are issued in accordance with a special form upon completion of the following procedure (Article 7).

Employers wishing to bring in workers from abroad submit an application on the form provided for that purpose to the Ministry of Social Affairs and Labour; to this they attach a character reference for the alien issued in his country which may not be more than three months old.

The Ministry of Social Affairs and Labour examines each application against the value of the worker to the economy, and the need to avoid competition with Kuwait workers and with workers already in the country. It then consults the Ministry of the Interior regarding any objection to the applicant's presence in the country.

If the application is approved, the Ministry delivers a no-objection certificate to the employer, who is required to sign it. When the worker arrives in the country, the employer is required to sign a declaration in which he engages: 1) to notify the Nationality, Passport and Residence Department as soon as his employment relationship with the worker is terminated; and 2) to return the worker at the employer's expense to his own country or to a closer location at the worker's option, when his contract expires or is otherwise terminated.

The same requirements hold for domestic servants and the like. In their case, however, if the worker wishes to change employers, he needs the consent of the original employer (Article 8).

Craftsmen and other workers who are not tied to a specific employer are required to present frontier passport officials with a work permit, as opposed to a no-objection certificate, issued by the Ministry of Social Affairs and Labour. Work permits are issued when the following procedures have been completed (Article 9): 1) the worker submits an application to a Kuwaiti mission abroad, accompanied by a character reference from his country that is not over three months old; 2) his file is forwarded by the Ministry of Foreign Affairs to the Nationality, Passport and Residence Department of the Ministry of the Interior for examination, which sends it back if it decides to reject it; and 3) if the Interior Ministry has no objections to the applicant's entry, it forwards his file to the Ministry of Social Affairs and Labour, which examines it against labor regulations and the needs of the country's economy. If it approves it, the Ministry sends a work permit to the Kuwaiti mission abroad through the Ministry of Foreign Affairs. Each work permit has a specific expiration date, but may be renewed by the Ministry of Social Affairs and Labour upon the request of its carrier.

Aliens who reside in Kuwait on an ordinary nonworking resident permit, and who wish to engage in work may do so only with the approval of the Ministry of the Interior (Article 13). This also pertains to foreign residents who are in Kuwait for the purpose of study. Permission is granted only after a no-objection certificate is obtained from the Ministry of Social Affairs and Labour with respect to the work in question (Article 14). Aliens residing in Kuwait as part of a resident family is subject to the regulations governing students (Article 15).

Any alien resident of Kuwait with an ordinary residence permit who wishes to engage in a commercial, industrial or professional activity for which he is legally licensed in Kuwait, is required to submit the official document authorizing this activity. He must do this every time he renews his application (Article 16).

GENERAL OBSERVATIONS

The following observations concern a number of questions on migration that are neglected by the laws and constitutions under discussion; questions of an importance that may exceed that of the actual provisions of these texts. The importance of the following observations resides in their intimate impact on the everyday lives of the persons governed by the laws of migration.

The first question neglected by the migration laws of these Arab countries is the status of the migrant's family; i.e., his wife and children, and his dependent relatives.

What is their status according to the law?

Arab legislation seems to be absolutely silent on the subject of the migrant worker's right to have his family accompany him. It would seem that the laws of Arab States implicitly permit the worker to bring his family with him, without, however, establishing or specifying the worker's rights, or clarifying the terms and conditions under which they are entitled to exercise them!

In other words, while the law does not explicitly prohibit the worker from taking members of his family along with him, his right to do so ought to be specifically guaranteed by law. In the absence of specific legislation, the worker's right becomes, in effect, conditional upon the terms of his contract with his employer. It goes without saying that these terms generally discourage the worker from bringing his family with him. This is done in the interest of the employer and often in deference to the worker's own understandable hesitation. Many workers prefer to migrate alone at least for the first period, so as to spare themselves the burden of settling their families abroad. In terms of the existing laws, the security of the worker's family in the host country remains at best precarious in the face of the restrictions placed on the immigrants. For example, they need to renew their residence permits annually, biannually or every five years. As renewal hinges on the administrative discretion of the authorities, the resulting insecurity of the alien's status discourages him from taking his family with him.

This is, in fact, a critical problem as it results in the dispersion of the families of thousands of migrants. The migrant's right to take his family with him will remain, in the last resort, at the mercy of the agreement each worker succeeds in negotiating with his employer until the law decides to establish it as a fundamental right necessary to the preservation of the unity of the family and its life together.

Viewed from the social standpoint, this question is a grave problem fraught with serious consequences. Social scientists should be urged to devote more attention to this problem so that all its implications can be revealed and its impact on the family unit, on family members and on society itself can be assessed.

Social research will undoubtedly be able to document the extent of the harm inflicted upon the families of workers who are constrained to migrate alone, leaving their families behind deprived of the security that only living together can provide.

The laws under study are also silent on the status of the families of workers who do succeed in migrating together. What security does the law provide for workers' wives and minor children in the host country? Are they entitled to receive the compensations, such as family allowances, that are their legal due in their home countries?

It may very well be that the families of migrant workers are entitled to the

same compensations and securities that are received by the families of citizens of some host countries.

Even if it were so, this would not be enough. Explicit and detailed laws that entitle the families of migrant workers to all the rights necessary to their well-being, and that guarantee them the minimum compensation and assurance necessary to induce them to accompany the head of the family to his new country of employment are needed. Such legislation should be enacted in the spirit of securing all that would serve to promote and preserve the unity of the worker's family at home and abroad.

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